Datuk Seri Anwar Ibrahim v Kerajaan Malaysia & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 06(RS)-1–03 OF 2019(W)
VERNON ONG, ZALEHA YUSOF, ZABARIAH YUSOF, HASNAH HASHIM, MARY LIM, HARMINDAR SINGH AND RHODZARIAH BUJANG FCJJ
6 AUGUST 2021

Constitutional Law — Legislation — Constitutionality of statute — National Security Council Act 2016 ('the NSCA') — Whether NSCA was unconstitutional for becoming law without receiving Royal Assent and for not being enacted under art 149 of Federal Constitution ('FC') — Whether NSCA was a security law that curtailed fundamental liberties and therefore should have been enacted under art 149 — Whether Acts of Parliament that amended art 66 of FC to deem Yang di-Pertuan Agong ('YDPA') as having assented to Bills passed by Parliament 30 days after such Bills were presented to him for Assent were unconstitutional for violating 'basic structure' of FC — Whether the amending Acts had interfered with YDPA's traditional role in the legislative process — Whether 'basic structure' doctrine in relation to the FC was part of Malaysian jurisprudence

The instant judgment followed a rehearing by the Federal Court of constitutional questions that were referred to it for determination by the High Court pursuant to s 84 of the Courts of Judicature Act 1964. The determination of those questions was intended to enable the High Court to deal with an originating summons ('OS') the appellant had filed in which he had, inter alia, sought to declare as unconstitutional and void the National Security Council Act 2016 ('the NSCA') as well as three Acts of Parliament (A566, A584 and A885) ('the amending Acts') which had amended art 66 of the Federal Constitution ('the FC'). With regard to the amending Acts, the appellant contended that they effectively removed the 'executive act' of the Yang di-Pertuan Agong ('YDPA') in assenting to Bills passed by Parliament and introduced a provision deeming that the YDPA had assented to a Bill 30 days after it was presented to him for his assent. This change, the appellant contended, violated the 'basic structure' of the FC because it interfered with the YDPA's traditional role in the legislative process. The appellant argued that one reason the NSCA was unconstitutional and void was because it had, as a result of the amending Acts, become law without actually receiving the Royal Assent. Yet another reason was that since the NSCA was a law concerning national security and contained Emergency-like provisions which curtailed fundamental liberties, including those guaranteed under arts 5, 9, 10 and 13 of the FC, it should have been enacted under art 149 of the FC which alone permitted the curtailment of such fundamental rights. The appellant said the

fact that the NSCA was only enacted as an ordinary law rendered the NSCA repugnant to the FC and liable to be struck down as void under art 4(1) of the FC. A third reason given by the appellant for saying that the NSCA was unconstitutional was that cll 18 and 22 of that Act together disproportionately violated the right to freedom of movement guaranteed under art 9(2) of the FC. At an earlier hearing, a different panel of the Federal Court had, by a majority, ruled that the referred constitutional questions did not warrant an answer because they were abstract, academic and hypothetical and had no nexus to any factual context, dispute or lis and neither had the appellant shown how he was personally affected by the questions raised. The appellant nevertheless succeeded in moving the court to review and set aside its decision and fix the matter for a rehearing on the ground that he was never given an opportunity to persuade the court that the constitutional questions were not abstract, academic or hypothetical.

Held, by majority, that the amending Acts and the NSCA were valid and constitutional:

(1) **(per Vernon Ong FCJ, dissenting)** Article 149 specifically empowered Parliament to pass laws which restricted the fundamental liberties under arts 5, 9, 10 or 13 of the FC. The NSCA was a security law equipped with Emergency-like sweeping powers which transgressed on all of the aforesaid fundamental liberties, yet it was only enacted as an ordinary law. The NSCA belonged to that class of legislation which came within the ambit of art 149 and should have been enacted under the authority of that article. Without the protective shield of art 149, the NSCA as an ordinary law which transgressed arts 5, 9, 10 and 13 was repugnant to the FC and void and unconstitutional under art 4(1) of the FC (see paras 58, 98, & 109–110).

(2) **(per Vernon Ong FCJ, dissenting)** Whatever might have been the policy consideration behind the enactment of the NSCA, any proposed legislation which fell within the class of subject-matter of legislation under art 149 must be enacted under the authority of art 149. To enact otherwise was ultra vires the legislative powers of Parliament (art 128) and such law was liable to be judicially reviewed and struck down under art 4(1) as being unconstitutional and void (see paras 106–107).

(3) **(per Vernon Ong FCJ, dissenting)** The amending Acts — Act A566, Act A584 and Act A885 — were not unconstitutional and the argument that the NSCA was unconstitutional because it had become law by virtue of those amending Acts that effectively took away the Royal Assent had no merit (see paras 54 & 110).

(4) **(per Vernon Ong FCJ, dissenting)** The amending Acts were intended to prescribe a time period within which a Bill became law if it was not assented to by the YDPA. The inclusion of a time period did not detract

from the YDPA's constitutional duty to give his assent to a Bill. If anything, it provided certainty and clarity by stipulating a time-frame for the performance of that duty. If the Royal Assent was not given at the expiry of the stipulated time period, the Bill was deemed to have been assented to and became law. As such, there was no question of the 'removal' of the YDPA's assent in the legislative process. The amending Acts did not introduce any substantive changes to the role and function of the YDPA in the giving of the Royal Assent to Bills under art 66 of the FC. Therefore, the allegation that they had offended the 'basic structure' of the FC had no basis (see paras 52–53).

(5) **(per Zaleha Yusof FCJ, majority)** The amending Acts did not at all serve to remove Royal Assent, as a Bill must still be presented to the YDPA under art 66(4) of the FC for the purpose of Royal Assent. The amending Acts only sought to clarify and define the procedure involving the YDPA in the law-making process to expedite the passing of laws. The Royal Assent was not an Executive act of the YDPA but a part of the legislative process as it came under Chapter 5 of Part IV of the FC under the heading of 'Legislative Procedure'. This Chapter explained the process and steps taken by the Legislature in enacting laws. Royal Assent was the final step of the legislative process before a Bill became law, so it was part of a legislative act. It was not an executive act that could not be disturbed or dispensed with. The 'basic structure' doctrine was not part of our jurisprudence but even if for a moment it was assumed that it was, the Royal Assent was not a feature of such doctrine (see paras 134–135 & 139).

(6) **(per Zaleha Yusof FCJ, majority)** The appellant's contention that 'law' in art 4(1) of the FC included Acts which amended the FC under art 159 and that the amending Acts — having been made under art 159 — were inconsistent with the FC and therefore void under art 4(1), was devoid of merit. This court had held on more than one occasion that 'law' in art 4(1) referred to ordinary law passed by Parliament and not to Acts that affected the FC. If amendments to the FC were valid only if they were consistent with its existing provisions, then clearly no change whatsoever could be made to the FC; in other words, art 159 would be superfluous (see paras 140–141).

(7) **(per Zaleha Yusof FCJ, majority)** The NSCA was a valid law which did not need to seek refuge under cl (1) of art 149 of the FC. Unless and until the condition precedent in cl (1) of art 149 was present, Parliament could not resort to art 149 to enact the NSCA and had quite rightly relied upon and utilised its authority and powers under art 74 read with List I of the FC to enact the NSCA. Article 149 was meant to curb prescribed activities that were taken or threatened by 'a substantial body of persons'. Article 149 directed its attention and focus on the activities of persons.

That was its restriction. Whereas the NSCA was much wider than that as it was also meant to cover other matters such as disasters and infectious diseases which definitely and undeniably affected national security (see paras 187 & 207).

(8) **(per Zaleha Yusof FCJ, majority)** When the NSCA Bill was tabled in Parliament, there was no mention or indication that it was to deal with subversion, organised violence, acts and crimes prejudicial to the public as intended under Part XI and specifically under art 149 of the FC. 'National security' was deliberately not defined in the NSCA in accordance with international norms and practices as the form of national threats was dynamic and changed according to prevailing circumstances. The function of the National Security Council ('NSC') under s 4 of the NSCA was, inter alia, to formulate policies and strategic measures on national security including sovereignty, territorial integrity, defence, socio-political stability, economic stability, strategic resources, national unity and other interests relating to national security. Even before the NSCA was enacted, there existed a NSC to co-ordinate policies related to the nation's safety and public peace. The then NSC had dealt with and co-ordinated relief measures when several instances of natural disasters occurred in the past and it had formulated a national security policy to deal with such matters as disasters, pandemics, infectious diseases and food security. It was important to note that ss 43–44 of the NSCA provided that whatever directives or action that was issued or taken by the NSC before the NSCA came into force continued to remain in force as if they were formulated under the NSCA. These sections were saving provisions which could not be disregarded. Based on this historical background, it was clear that the NSCA was not meant to be a law against subversion but was wide-ranging and included the protection and safety of people against such situations as natural disasters and pandemics. The NSCA had to be read as a whole to determine its real purpose and intent and merely because some of its provisions had similarities to other laws enacted under art 149 did not mean the NSCA should also have been enacted under that article. Ultimately, it was for Parliament to determine whether it should use its special powers under art 149 to enact a law to deal with any of the situations described in paras (a)–(f) of art 149(1) if they existed. It was not for the courts to say that Parliament ought to have used its special powers under art 149 and not its general powers under art 74 to enact a law (see paras 164–188).

(9) **(per Zaleha Yusof FCJ, majority)** The appellant's contention that the NSCA was unconstitutional and void because it violated the freedom of movement guaranteed under art 9(2) of the FC was not a question that arose from the OS that he had filed in the High Court and there was no factual basis upon which to evaluate that allegation. There was a serious

void of essential facts and at no time did the appellant allege that his freedom of movement had been impeded as a result of any exercise of the powers under ss 18 and 22 of the NSCA. The apex court should not be called upon to answer constitutional questions and challenges on the constitutionality of any law in vacuo where injustice might result from a decision of the court. The questions that were posed in the instant special case were, in fact, abstract, hypothetical and academic (see paras 119, 189 & 207).

(10) **(per Zaleha Yusof FCJ, majority)** Sections 22 and 18 of the NSCA did not run afoul of art 9(2) of the FC. The measures adopted in s 22 were justified as it had a rational nexus and was proportionate to the objective to be addressed, namely, national security. Matters of national security and public order involved policy considerations which were within the domain of the Executive and the courts should not intervene and should be hesitant in doing so as these were matters especially within the preserve of the Executive (see para 206).

[Bahasa Malaysia summary

Penghakiman semasa diikuti oleh perbicaraan semula oleh Mahkamah Persekutuan untuk persoalan perlembagaan yang dirujuk kepadanya untuk ditentukan oleh Mahkamah Tinggi menurut s 84 Akta Mahkamah Kehakiman 1964. Penentuan persoalan tersebut bertujuan untuk membolehkan Mahkamah Tinggi memutuskan saman pemula ('SP') yang telah difailkan perayu yang mana beliau, antara lain, memohon untuk mengisytiharkan Akta Majlis Keselamatan Negara 2016 ('AMKN') serta tiga Akta Parlimen (A566, A584 dan A885) ('Akta pindaan') sebagai tidak berperlembagaan dan tidak sah yang telah meminda perkara 66 Perlembagaan Persekutuan ('PP'). Berkenaan dengan Akta pindaan, perayu berpendapat bahawa ianya secara efektif telah menghapus 'kuasa eksekutif' Yang di-Pertuan Agong ('YDPA') dalam memberi perkenan kepada Rang Undang-Undang yang diluluskan oleh Parlimen dan memperkenalkan peruntukan yang menganggap bahawa YDPA telah memberikan perkenan kepada Rang undang-undang 30 hari selepas ia dikemukakan kepadanya untuk perkenannya. Perubahan ini, perayu berpendapat, melanggar 'struktur asas' PP kerana mengganggu peranan tradisional YDPA dalam proses perundangan. Perayu berpendapat bahawa salah satu sebab AMKN adalah tidak berperlembagaan dan tidak sah adalah kerana ia, oleh kerana Akta pindaan, menjadi undang-undang tanpa benar-benar mendapat Perkenan Diraja. Alasan lain adalah kerana AMKN adalah undang-undang mengenai keselamatan negara dan mengandungi peruntukan seperti peruntukan Darurat yang mengekang kebebasan asasi, termasuk yang dijamin di bawah perkara 5, 9, 10 dan 13 PP, maka ia seharusnya digubal di bawah perkara 149 PP yang dengan sendirinya membenarkan pengekangan hak asasi tersebut. Perayu menyatakan fakta bahawa AMKN hanya digubal sebagai undang-undang biasa yang menjadikan

AMKN tidak terpakai kepada PP dan harus diputuskan sebagai tidak sah di bawah perkara 4(1) PP. Alasan ketiga yang diberikan oleh perayu dalam mengatakan bahawa AMKN tidak berperlembagaan adalah bahawa klausa 18 dan 22 Akta tersebut bersesama melanggar hak kebebasan bergerak yang dijamin di bawah perkara 9(2) PP. Pada perbicaraan sebelumnya, panel yang berbeza dari Mahkamah Persekutuan, dengan majoriti, memutuskan bahawa persoalan perlembagaan yang dirujuk tidak memerlukan jawapan kerana ia bersifat abstrak, akademik dan hipotetis dan tidak mempunyai hubungan dengan sebarang konteks fakta, pertikaian, atau lis, dan perayu juga tidak menunjukkan bagaimana beliau secara peribadi terkesan dengan persoalan yang diajukan. Perayu bagaimanapun berjaya membawa mahkamah untuk menyemak dan mengetepikan keputusannya dan menetapkan perkara tersebut untuk perbicaraan semula dengan alasan bahawa beliau tidak pernah diberi kesempatan untuk meyakinkan mahkamah bahawa persoalan perlembagaan tersebut adalah tidak abstrak, akademik atau hipotesis.

Diputuskan, secara majoriti, bahawa Akta pindaan dan AMKN adalah sah dan berperlembagaan:

(1) **(oleh Vernon Ong HMP, menentang)** Perkara 149 secara khusus memberi kuasa kepada Parlimen untuk meluluskan undang-undang yang mengekang kebebasan asasi di bawah perkara 5, 9, 10 atau 13 PP. AMKN adalah undang-undang keselamatan yang dilengkapi dengan kuasa seperti penolakan keadaan darurat yang melangkaui kesemua kebebasan asasi yang disebutkan di atas, namun ia hanya digubal sebagai undang-undang biasa. AMKN tergolong dalam kelas perundangan yang termasuk dalam perkara 149 dan seharusnya telah digubal di bawah otoriti Perkara tersebut. Tanpa perisai pelindung perkara 149, AMKN sebagai undang-undang biasa yang melangkaui perkara 5, 9, 10 dan 13 bertentangan dengan FC dan adalah tidak sah dan tidak berperlembagaan di bawah perkara 4(1) PP (lihat perkara 58, 98 & 109–110).

(2) **(oleh Vernon Ong HMP, menentang)** Apa pun yang mungkin menjadi pertimbangan dasar di sebalik penggubalan AMKN, setiap undang-undang yang diusulkan yang termasuk dalam kelas perkara utaman perundangan di bawah perkara 149 harus digubal di bawah autoriti perkara 149. Untuk menggubal sebaliknya adalah ultra vires kuasa perundangan Parlimen (perkara 128) dan undang-undang tersebut dapat disemak secara kehakiman dan dinyatakan di bawah perkara 4(1) sebagai tidak berperlembagaan dan tidak sah (lihat perenggan 106–107).

(3) **(oleh Vernon Ong HMP, menentang)** Akta pindaan — Akta A566, Akta A584 dan Akta A885 — adalah bukan tidak berperlembagaan dan pendapat bahawa AMKN adalah tidak berperlembagaan kerana ia telah menjadi undang-undang berdasarkan Akta pindaan yang secara efektif

membuang Perkenan Diraja tidak ada merit (lihat perenggan 54 & 110). A

(4) **(oleh Vernon Ong HMP, menentang)** Akta pindaan adalah bertujuan untuk menetapkan tempoh masa di mana Rang Undang-Undang menjadi undang-undang sekiranya tidak diperkenan oleh YDPA. Kemasukan tempoh masa tidak mengurangkan tugas perlembagaan YDPA untuk memberikan perkenannya kepada Rang Undang-Undang. Sekiranya ada, ia memberikan kepastian dan penjelasan dengan menetapkan tempoh masa untuk melaksanakan tugas tersebut. Sekiranya Perkenan Diraja tidak diberikan semasa peluputan tempoh masa yang ditetapkan, Rang Undang-Undang tersebut dianggap telah diperkenan dan menjadi undang-undang. Oleh itu, tidak ada persoalan mengenai 'penghapusan' perkenan YDPA dalam proses perundangan. Akta Pindaan tidak memperkenalkan perubahan substansif pada peranan dan fungsi YDPA dalam memberikan Perkenan Diraja kepada Rang Undang-Undang berdasarkan perkara 66 PP. Oleh itu, dakwaan bahawa ia telah menentang 'struktur asas' PP tidak mempunyai asas (lihat perenggan 52–53). B C D

(5) **(oleh Zaleha Yusof HMP, majoriti)** Akta pindaan sama sekali bukan berfungsi untuk menghapus Perkenan Diraja, kerana Rang Undang-Undang masih harus dikemukakan kepada YDPA di bawah perkara 66(4) PP untuk tujuan Perkenan Diraja. Akta pindaan hanya bertujuan untuk menjelaskan dan menentukan prosedur yang melibatkan YDPA dalam proses pembuatan undang-undang untuk mempercepat penggubalan undang-undang. Perkenan Diraja bukan merupakan kuasa Eksekutif YDPA tetapi merupakan sebahagian dari proses perundangan seperti yang dinyatakan di bawah Bab 5 Bahagian IV FC di bawah tajuk 'Tatacara Perundangan'. Bab ini menjelaskan proses dan langkah-langkah yang diambil oleh Badan Perundangan dalam menggubal undang-undang. Perkenan Diraja adalah langkah terakhir dalam proses perundangan sebelum Rang Undang-Undang menjadi undang-undang, jadi ia adalah sebahagian dari kuasa perundangan. Ia bukan kuasa eksekutif yang tidak dapat diganggu atau diabaikan. Doktrin 'struktur asas' bukan merupakan sebahagian dari jurisprudens kita tetapi bahkan jika sesaat ia dianggap sedemikian, Perkenan Diraja bukanlah ciri doktrin tersebut (lihat perenggan 134–135 & 138). E F G H

(6) **(oleh Zaleha Yusof HMP, majoriti)** Pendapat perayu bahawa 'undang-undang' dalam perkara 4(1) PP termasuk Akta yang meminda PP di bawah perkara 159 dan bahawa Akta pindaan — yang dibuat di bawah perkara 159 — tidak konsisten dengan PP dan oleh itu terbatal di bawah perkara 4(1), adalah tanpa merit. Mahkamah ini telah memutuskan lebih dari satu kali bahawa 'undang-undang' dalam perkara 4(1) merujuk kepada undang-undang biasa yang diluluskan oleh Parlimen dan bukan kepada Akta yang mempengaruhi PP. Sekiranya I

pindaan terhadap PP hanya sah jika ia sesuai dengan peruntukan sedia ada, maka jelas tidak ada perubahan yang dapat dibuat kepada PP; dengan kata lain, perkara 159 akan menjadi tidak wajar (lihat perenggan 140–141).

(7) **(oleh Zaleha Yusof HMP, majoriti)** NSCA adalah undang-undang yang sah yang tidak perlu berlindung di bawah klausa (1) perkara 149 PP. Kecuali dan sebelum syarat duluan dalam klausa (1) perkara 149 dikemukakan, Parlimen tidak boleh menggunakan perkara 149 untuk menggubal AMKN dan dengan sewajarnya bergantungan dan menggunakan otoriti dan kuasanya di bawah perkara 74 yang dibaca bersama Senarai I PP untuk menggubal AMKN. Perkara 149 dimaksudkan untuk mengekang kegiatan yang ditentukan yang diambil atau diancam oleh 'sejumlah besar orang'. Perkara 149 mengarahkan perhatian dan fokus pada kegiatan orang. Itulah kekangannya. Sedangkan AMKN jauh lebih luas daripada itu kerana ia juga dimaksudkan untuk mencakupi perkara-perkara lain seperti bencana dan penyakit berjangkit yang tentunya dan tidak dapat disangkal mempengaruhi keselamatan negara (lihat perkara 187 & 207).

(8) **(oleh Zaleha Yusof HMP, majoriti)** Semasa Rang Undang-Undang AMKN dibentangkan di Parlimen, tidak ada disebut atau dinyatakan bahawa ia adalah untuk menangani penindasan, keganasan terancang, tindakan dan jenayah yang memudaratkan masyarakat sebagaimana dimaksudkan dalam Bahagian XI dan secara khusus di bawah perkara 149 PP. 'Keselamatan Negara' telah dengan sengaja tidak didefinisikan di dalam NSCA bersesuaian dengan norma dan amalan antarabangsa kerana bentuk ancaman Negara adalah bersifat dinamik dan berubah mengikut keadaan semasa. Fungsi Majlis Keselamatan Negara ('MKN') di bawah s 4 AMKN adalah, antara lain, untuk merumuskan dasar dan langkah-langkah strategik keselamatan negara termasuk kedaulatan, integriti wilayah, pertahanan, kestabilan sosio-politik, kestabilan ekonomi, sumber strategik, perpaduan negara dan kepentingan lain yang berhubung dengan keselamatan negara. Bahkan sebelum AMKN digubal, wujudnya MKN untuk menyelaraskan dasar-dasar yang berkaitan dengan keselamatan negara dan keamanan masyarakat. MKN ketika itu telah menangani dan menyelaraskan langkah-langkah bantuan ketika beberapa kejadian bencana alam terjadi pada masa lalu dan telah merumuskan dasar keamanan negara untuk menangani hal-hal seperti bencana, pandemik, penyakit berjangkit dan sekuriti makanan. Ia amat penting untuk menyatakan bahawa ss 43–44 AMKN dengan syarat bahawa apa sahaja arahan atau tindakan yang dikeluarkan atau diambil oleh MKN sebelum AMKN dikuatkuasa terus berkuatkuasa seolah-olah ia dirumuskan di bawah AMKN. Seksyen ini peruntukan keselamatan yang tidak dapat diabaikan. Berdasarkan latar belakang sejarah ini, jelas bahawa AMKN tidak dimaksudkan untuk menjadi undang-undang

terhadap penindasan tetapi adalah meluas dan mencakupi perlindungan dan keselamatan rakyat terhadap situasi seperti bencana alam dan pandemik. AMKN harus dibaca secara keseluruhan untuk menentukan tujuan dan maksud sebenarnya dan hanya kerana beberapa peruntukannya mempunyai persamaan dengan undang-undang lain yang digubal di bawah perkara 149 tidak bererti AMKN seharusnya juga digubal di bawah Perkara tersebut. Pada akhirnya, ia adalah untuk Parlimen untuk menentukan sama ada ia harus menggunakan kuasa khasnya di bawah perkara 149 untuk menggubal undang-undang dalam menangani situasi yang dijelaskan dalam perenggan (a)–(f) perkara 149(1) sekiranya ada. Ia bukan untuk mahkamah untuk mengatakan bahawa Parlimen seharusnya menggunakan kuasa khasnya di bawah perkara 149 dan bukan kuasa amnya di bawah perkara 74 untuk menggubal undang-undang (lihat perenggan 164–188).

(9) **(oleh Zaleha Yusof HMP, majoriti)** Pendapat perayu bahawa AMKN tidak berperlembagaan dan tidak sah kerana melanggar kebebasan bergerak yang dijamin di bawah perkara 9(2) PP bukanlah persoalan yang timbul dari OS yang difailkannya di Mahkamah Tinggi dan ada tidak ada asas fakta untuk menilai dakwaan tersebut. Terdapat kekosongan serius pada fakta-fakta penting dan tidak juga perayu mendakwa bahawa kebebasan bergeraknya telah terhalang sebagai akibat dari penguatkuasaan kuasa di bawah ss 18 dan 22 AMKN. Mahkamah Agung tidak boleh dipanggil untuk menjawab persoalan dan cabaran mengenai perlembagaan undang-undang dalam in vacuo di mana ketidakadilan mungkin berlaku akibat keputusan mahkamah. Persoalan yang diajukan dalam kes khas semasa, sebenarnya, abstrak, hipotesis dan akademik (lihat perenggan 119, 189 & 207).

(10) **(oleh Zaleha Yusof HMP, majoriti)** Seksyen 22 dan 18 AMKN tidak melanggar perkara 9(2) PP. Langkah-langkah yang diambil dalam s 22 adalah dibenarkan kerana ia memiliki hubungan yang rasional dan berkadaran dengan tujuan yang harus ditangani, iaitu keamanan negara. Perkara-perkara keselamatan negara dan ketenteraman awam melibatkan pertimbangan dasar yang berada dalam ruang lingkup Eksekutif dan mahkamah tidak boleh campur tangan dan tidak seharusnya ragu-ragu untuk melakukannya kerana ini adalah perkara yang berada dalam ruang lingkup Eksekutif (lihat perenggan 206)]

Cases referred to

Ainsbury v Millington [1987] 1 All ER 929, HL (refd)

Alma Nudo Atenza v PP and another appeal [2019] 4 MLJ 1; [2019] 5 CLJ 780, FC (refd)

Assa Singh v Mentri Besar, Johore [1969] 2 MLJ 30, FC (refd)

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Board of Commissioners of Peace Officers Annuity and Benefit Fund v Clay 102 SE 2d 575, SC (refd)
Chai Siew Yin v Leong Wee Shing [2004] 1 CLJ 752, CA (refd)
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Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener) [2004] 2 MLJ 257, FC (folld)
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Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor [2020] 4 MLJ 133; [2020] 3 CLJ 593, FC (refd)
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Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors [2018] 3 MLJ 417; [2018] 4 CLJ 1, FC (refd)
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Appeal from: Originating Summons No WA-24–97–08 of 2016 (High Court, Kuala Lumpur)

H *Gopal Sri Ram (Leela Jesuthasan, How Li Nee and Marcus Lee with him) (Leela J) for the appellant.*
Suzana Atan (Narkunavathy Sundareson and Noor Atiqah Zainal Abidin with her) (Attorney General's Chambers) for the respondent.

I **Vernon Ong FCJ (delivering dissenting judgment of the court):**

INTRODUCTION

[1] This is a rehearing of the special case relating to the constitutionality of the National Security Council Act 2016 ('the NSCA 2016'). This case has been

transmitted from the High Court to the Federal Court under s 84 of the Courts of Judicature Act 1964 ('the CJA 1964'). Pursuant to s 85 of the CJA 1964, this special case shall be heard and determined in the same way as an appeal to the Federal Court.

[2] The two constitutional questions in this special case are as follows:

(1) whether the following provisions of written law are unconstitutional, null and void and of no effect:

(i) s 13 of the Constitution (Amendment) Act 1983 (Act A566);

(ii) s 2 of the Constitution (Amendment) Act 1984 (Act A584); and

(iii) s 8 of the Constitution (Amendment) Act 1994 (Act A885),

on the ground that they violate the basic structure of the FC.

(2) whether the NSCA 2016 is unconstitutional, null and void and of no effect on the following grounds:

(i) it became law pursuant to unconstitutional amendments;

(ii) it was not enacted in accordance with art 149 of the FC; and

(iii) it violated the freedom of movement guaranteed by art 9(2) of the FC.

[3] This special case was originally heard by another panel of this court which gave its decision on 11 February 2020, by which the majority declined to answer the constitutional questions on the grounds that the questions are abstract, academic and hypothetical (*Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2020] 4 MLJ 133; [2020] 3 CLJ 593) (FC) ('DSAI No 1'). Subsequently, the appellant filed an application under r 37 of the Rules of the Federal Court 1995 and the inherent jurisdiction of the court to set aside that decision. The appellant's complaint was that there was a breach of natural justice on two grounds: (i) the appellant was not given the opportunity to be heard on the issue of whether the constitutional questions were abstract, academic and hypothetical; and (ii) the breach has resulted in a grave injustice for the appellant. The *DSAI No 1* decision was subsequently set aside on 10 September 2020 on the grounds that there was a breach of the right to be heard which had resulted in a grave injustice to the appellant. This is therefore a rehearing of this special case before a different coram.

[4] Before us, learned senior federal counsel (SFC) appearing for the respondents reiterated their stand that the matter is not academic, abstract or hypothetical and that they were prepared to defend Acts A566, A584 and A885 ('Amendment Acts') and the NSCA 2016 at this hearing. I am mindful of the fact that notwithstanding that the respondents took the same position in *DSAI*

No 1, the majority declined to answer the constitutional questions on the abovementioned grounds. In this respect, I have had the benefit of perusing both the majority and the minority judgments in *DSAI No 1* on this particular point. After careful consideration, I am of the view that the constitutional questions are not academic, abstract or hypothetical. Suffice it to say that on this issue, I associate myself wholly with the opinion of Tengku Maimun Tuan Mat CJ in *DSAI No 1* at paras [5]–[34] (MLJ); paras[72]–[101] (CLJ).

[5] In my opinion, any court, and in particular the Federal Court as the apex court in this country should always proceed with special caution before deciding on a point on which the parties were not heard. This is especially so as the Federal Court would thereby be acting without the benefit of adversary argument. As such, counsel who argued this case would probably not recognise any part of the judgment as having any relation to the arguments they addressed to the court. Where the point is relatively peripheral, this is no need to ask for further submissions. Certainly, natural justice does not require the court to do so. But where the point is important and, particularly where it is decisive, to deny the parties the opportunity to make submissions on it is not only to deny natural justice. It is also to discard one of the advantages of our common law adversarial system as a means of propounding and developing the law.

AT THE HIGH COURT

[6] The appellant brought an action against the Government of Malaysia and the National Security Council ('NSC') in the High Court for various declarations, which include:

(a) a declaration that s 12 of Act A566, s 2 of Act A584 and s 8 of Act A885 are unconstitutional, null and void and of no effect;

(b) a consequential declaration that arts 66(4) and 66(4A) of the FC, as introduced by Act A885, are unconstitutional, null and void and of no effect;

(c) a declaration that the NSCA 2016 is unconstitutional, null and void and of no effect; and

(d) an injunction to restrain the second defendant from taking any steps or acting on the NSCA 2016.

[7] The Government of Malaysia and the NSC did not file any affidavit in opposition to the appellant's affidavit in support to his application.

THE APPELLANT'S SUBMISSION

[8] In brief, the appellant challenges the constitutionality of the three Amendment Acts on the ground that it removed the requirement of the royal assent which is an Executive act, which the appellant contends is part of the basic structure of the Federal Constitution ('the FC'). The appellant also challenges the constitutionality of the NSCA 2016 on three grounds:

(a) it became law pursuant to unconstitutional amendments in that the NSCA was enacted without receiving the royal assent;

(b) it was not enacted in accordance with art 149 of the FC; and

(c) the disproportionate restriction on the liberty of the subject.

First point — Institution of the Yang di-Pertuan Agong (YDPA)

[9] Learned counsel for the appellant Dato' Seri Gopal Sri Ram argued that as the head of the Executive the YDPA's act in granting the royal assent is an Executive act which is part of the basic structure of the FC. The three Amendment Acts have effectively removed that assent in cl (4) of art 66. It has made it a deemed assent which impedes on a vital part of the FC in two ways. One, it impedes on the Executive act of the YDPA to assent, and two, it interferes with the democratic process.

[10] Even if the YDPA performs a legislative act as part of the larger parliamentary process, that royal assent nevertheless forms part of the basic structure. Therefore, art 66(4) in its current form violates the basic structure as the YDPA could now be taken to have given his assent even though the assent has not in fact been given. Any amendment which impedes on the YDPA's right of assent as a constitutional monarch is unconstitutional, null and void.

Second point — Articles 4(1) and 159 of the FC and basic structure doctrine

[11] Learned counsel submitted on the basic structure doctrine ('BSD') in the context of arts 4(1) and 159 of the FC and on the distinction between ordinary laws and laws that amend the Constitution. That distinction, he argued, is borne out by the contrast between the words 'any law passed after Merdeka Day' in art 4(1) and the words 'the provisions of this Constitution' in art 159; that those words refer to different things, particularly so when different words are used repeatedly (*Lee Lee Cheng (F) v Seow Peng Kwang* [1960] 1 MLJ 1 at p 3). The federal law referred to in art 159 comes definitionally within the 'law' referred to in art 4(1) because: (i) the phrase 'any law passed after Merdeka Day' must include an Act of Parliament which is a 'law passed' by Parliament; and (ii) by s 66 of the Consolidated Interpretations Acts 1948 and 1967 ('the Interpretation Acts') 'law' includes 'written law' which in turn means 'all Acts of

Parliament'. Therefore, an Act that amends the Constitution falls within art 4(1). In support of this proposition, counsel cited the concurring judgment of Wan Suleiman FCJ in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 at p 192. However, learned counsel discounted *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70 as authority for the proposition that 'law' in art 4(1) does not include 'federal law' in art 159 on two grounds. First, the Federal Court sought to follow Raja Azlan Shah FCJ in *Loh Kooi Choon* without having regard to the opposite view of Wan Suleiman FCJ on the critical point. Secondly, Raja Azlan Shah FCJ was the only judge who held that view. Wan Sulaiman FCJ did not agree with him on the point. The presiding judge Ali FCJ passed away before judgment could be delivered. It was a Bench of two justices differing upon a critical point of law. In those circumstances, subsequent decisions that relied on *Loh Kooi Choon* for the proposition that federal law in art 159 was immune from attack on substantive grounds under art 4(1) were wrongly decided.

[12] Learned counsel also pointed to an internal inconsistency in the judgment of the Federal Court in *Phang Chin Hock*. In essence, it is this — that the Federal Court relied on Indian cases decided in 1951 and 1965 (see *Sri Sankari Prasad Singh Deo v Union of India* 1951 AIR 458 and *Sajjan Singh v State of Rajasthan* 1965 AIR 845) on the doctrine of harmonious construction whilst on the other hand declining to apply the Indian position on BSD (propounded in *Kesavananda Bharati v State of Kerala* AIR 1983 1461 and its progeny, including *Indira Nehru Ghandi v Shri Raj Narain & Anr* 1975 AIR 1590, *Minerva Mills Ltd & Ors v Union of India & Ors* (1980) 3 SCC 625) because of the distinction between plenary power and constituent power.

[13] It was submitted that the BSD is integrated into our Constitution by way of art 4(1) which employ the phrase 'inconsistent with *this Constitution*'. Article 4(1) does not say 'inconsistent with *any provision* of this Constitution'. It was argued that a harmonious result is obtained by interpreting arts 4(1) and 159 through the application of either the direct consequence test or by applying the pith and substance canon of construction. Accordingly, where federal law amends a provision of the Constitution and a challenge is taken that the amendment violates the basic structure, the court must make that determination by asking whether the direct and inevitable consequence of the amending law is to impact upon the basic structure (*Maneka Gandhi v Union of India* 1978 AIR 597; *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697). In the alternative, the court may apply the pith and substance test to determine whether the given amendment Act is invalid because in pith and substance it violates the basic structure of the Constitution (*Sajjan Singh*, per Gajendragadkar CJ). What elements constitute the basic structure must be decided on a case-to-case basis. It was argued that the following are clearly identifiable as forming part of the basic structure, not

necessarily in order of importance: (i) the sovereignty of the nation; (ii) the supremacy of the Constitution, (iii) the doctrine of separation of powers; (iv) the federal structure; (v) Constitutional Monarchy; (vi) judicial power; (vii) judicial review; (vii) parliamentary democracy; (ix) free and fair elections held once every five years; (x) the Fundamental Liberties housed in Part II; and (xi) the Conference of Rulers.

Third point — Validity of the NSCA 2016

[14] Learned counsel submitted that as the NSCA 2016 deals with the security of the federation, it must be enacted under art 149 of the FC. The long title to the NSCA Act 2016 makes it clear that it is a national security statute. Sections 3, 4, 16 and 18 reinforces the conclusion that this is an Act relating to national security. Section 18 of the NSCA 2016 which originally empowered the Prime Minister to declare any part of the federation as a security area was subsequently amended to confer that power on the YDPA.

[15] If such a declaration is made, there are serious implications which impede on the fundamental rights under arts 5, 9, 10 and 13 of the FC. A declaration would give the Director of Operations the power to exclude any person from the security area (s 22), to control the movement of any person (s 24), power of arrest (s 25), power to take temporary possession of land, building or movable property for which compensation shall be assessed by the Director General of National Security (ss 30 and 32), power to dispense with inquests for loss of life (s 35). Section 22 read with the other sections of the NSCA 2016 violates the freedom of movement guaranteed by art 9(2). As such, it was submitted that such rights can only be impeded if the law was passed under art 149; that since the NSCA 2016 was not passed under art 149 the NSCA 2016 is unconstitutional, null and void.

[16] Learned counsel for the appellant accepted that freedom of movement may be restricted by a law relating to the security of the Federation or on grounds of public order or public health. However, he argued that such law must pass muster in two respects. First, it must meet the test of proportionality as laid down by the Federal Court in *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1; [2019] 5 CLJ 780 at paras 117–120, 126, 127(d), 143–145 and in *Public Prosecutor v Azmi bin Sharom* [2015] 6 MLJ 751. Although the two cases were decided under art 8 and art 19(2) respectively, it applies with equal force to a restriction imposed under art 9, otherwise an anomalous situation will arise where the law referred to in arts 8 and 10(2) would be subject to the doctrine of proportionality, but the law referred under art 9(2) would not. To prevent such an anomaly arising, the constitutional provision should be read harmoniously (per Shelat and Grover JJ, in *Kesavananda Bharati v State of Kerala* AIR 1983 1461 at para 543.

Second, there must be compliance with art 4(1). The organic method of interpretation of statutes is to be preferred (*Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir (Attorney General, intervener)* [2010] 2 MLJ 285 at para [28]).

THE RESPONDENTS' SUBMISSION

Reply on first point

[17] Learned SFC argued that the YDPA is a constitutional monarch under our constitutional scheme which is based on the concept of a constitutional monarchy and a Westminster-model executive including the relations between the monarch and the real executive, the Cabinet (*Andrew Harding: The Constitution of Malaysia: A Contextual Analysis* at pp 53–55). The executive authority of the Federation is vested in the YDPA, and is exercisable by him or by the Cabinet or a Minister authorised by the Cabinet (art 39 of the FC). However, where the YDPA exercises his functions under the Constitution or federal law, he shall act on the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet (art 40(1A) of the FC).

[18] Article 66(4) forms part of the legislative procedure provisions of the FC. The YDPA's role in the exercise of legislative power lies in the assent he gives to a Bill. However, in respect of this legislative function, the YDPA does not have any discretion. He has to signify his assent to the Bill in accordance with the provisions of art 40(1). Article 66 accords with his role as a constitutional monarch who acts on advice.

[19] Since the royal assent is a non-discretionary exercise by the YDPA, there is essentially no difference between the original art 66 and the current position today. The three Amendment Acts have not introduced any substantive changes save to provide for the eventuality that a Bill is not assented to by the YDPA. This rationale was captured in the speeches of the then Prime Minister in tabling Acts A586 and A584 was that the amendments were necessary to avoid undermining the power of elected representatives of Parliament to make law, in the event the YDPA for some reason refused to give his assent to a Bill; that such a situation would not accord with the system of both the constitutional monarchy and parliamentary democracy (*Penyata Rasmi Parlimen I 11 Ogos 1983 dan 3 Ogos 1983* at pp 8564, 8895–8898; *Penyata Rasmi Parlimen 9 Januari 1984* at pp 14541–14544). In 1994, the constitutional amendments were tabled by the then Deputy Prime Minister who explained that the amendment was to uphold the sovereignty of the people's will through their elected representatives as it was to ensure that the legislative process is not delayed once the Bill has passed through both Houses of Parliament (*Penyata Rasmi Parlimen 9 Mei 1994* at pp 2439–2441).

[20] As the YDPA has to act on advice in giving royal assent to a Bill, the YDPA has no discretion in the matter. In such a case, it is not a Constitution fundamental, and cannot form the basic structure of the Constitution. Consequently, the issue of amending Acts A566, A584 and A885 offending the basic structure does not arise.

Reply on the second point

[21] Learned SFC argued that the starting point is that there is a strong presumption in favour of the constitutionality of provisions in a statute (*Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 (FC)). The onus is on the appellant to show that the law is unconstitutional.

[22] The appellant's argument was rejected by the Federal Court in *Phang Chin Hock* which held that the word 'law' in art 4(1) refers only to federal law enacted in the ordinary way and is to be distinguished from Acts amending the Constitution. So long as the amending Acts are made in compliance with the conditions under art 159, then they are still valid even if they are inconsistent with the Constitution. Further, in *Loh Kooi Choon*, the Federal Court opined that any provision to the Federal Constitution amended in accordance with the provisions providing for amendment, becomes an integral part of the Constitution and cannot be at variance with itself.

Reply on the third point

[23] Learned SFC argued that the NSCA 2016 is not a law enacted pursuant to art 149. Unlike other laws such as the Security Offences (Special Measures) Act 2012 and Prevention of Terrorism Act 2015, the recital to the NSCA 2016 makes no reference to art 149 or the purposes set out therein for enacting the law. The recital to the NSCA 2016 states that it is an Act to provide for the establishment of the National Security Council, the declaration of security areas, the special powers of the Security Forces in the security areas and other related matters.

[24] In this connection, it was argued that the right to freedom of movement under art 9(2) of the FC is not absolute. It is subject to any law relating to national security and that the NSCA 2016 is such a law.

[25] When a legislation is challenged on this ground, the test is whether the legislative action is proportionate to the object it seeks to achieve, in order to justify limiting a fundamental right (*Public Prosecutor v Azmi bin Sharom* at paras [41] and [4])). It calls for the balancing of interests of the state or

community and the protection of fundamental rights (*Alma Nudo Atenza* at paras [119] and [120]).

[26] The circumstances in which an area is declared a security area is one where the threat is grave and has potential to cause serious harm. It would be imperative and necessary to exclude or evacuate persons from a security area. Section 22 has a rational nexus to the objective to be addressed, ie, national security. The measures adopted in s 22 are justified and cannot be said to be disproportionate to measures taken to address national security. The courts have always been circumspect in reviewing legislation dealing with national security. They will defer to the judgment of the Executive on issues of national security as only the Executive may possess information on the matter. Mattes of security also involve policy considerations which are within the preserve of the Executive (*Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 81).

ANALYSIS AND FINDINGS

[27] It is, I think important to set out the contextual background to the constitutional questions posed in this special case. I will begin with a brief reappraisal of: (i) the fundamental tenets of the FC; (ii) the institution of the YDPA; and (iii) the legislative power of Parliament to make laws.

The Federal Constitution

[28] The FC is a complete set of fundamental laws that sets out the manner in which the State is constituted — organisationally, politically, and its underlying philosophy. The Federation of Malaysia comprising of thirteen States was constituted by the FC as a federal parliamentary constitutional monarchy. The FC is the fountainhead of the Federation as it precedes the legal order that it creates. The FC also creates, defines and limits the powers and functions of the three branches of government: *the Executive*, *the Legislature* and *the Judiciary*, including their relationship with each other and with the citizen. More significantly, the FC has embraced a constitutional 'Bill of Rights' in Part II on Fundamental Liberties under arts 5–13 of the FC.

[29] The FC is the supreme law of the Federation: art 4(1). The FC is the law on which all other laws must conform and from which all other laws are ultimately derived. It is the source of all legal authority. It provides the yardstick for testing the validity of all other laws. It is the embodiment of constitutional supremacy (see Shad Saleem Faruqi, *Document of Destiny, The Constitution of the Federation of Malaysia*, Star Publications 2008 at pp 21–22). In other words, the FC as law is the supreme authority in the country and it is therefore supreme over Parliament, the Executive and even the Judiciary.

[30] In essence, the FC embodies three basic concepts: (i) an individual's fundamental civil, cultural, economic and political rights; (ii) the distribution of sovereign power between the States and the Federation; and (iii) distribution of sovereign power among the Executive, Legislative and Judicial branches of government, compendiously expressed in modern terms that we are a government of laws, not of men (per Raja Azlan Shah FCJ (as HRH then was) in *Loh Kooi Choon* at 188). This expression underpins the principle of the Rule of Law that people should obey the law and be ruled by it and that the government shall be ruled by the law and be subject to it.

The Yang di-Pertuan Agong

[31] The institution of the YDPA as a constitutional monarch and Supreme Head of the Federation was created by the FC: art 32. Although the YDPA is the formal head of the executive branch, the YDPA is required to act on the advice of the Cabinet or any Minister authorised by the Cabinet: arts 39 and 40. There are, however, certain exceptions under the FC which provide that the YDPA may act in his personal discretion — notably, these include: (i) the appointment of the Prime Minister (art 40(2)(a)); (ii) the withholding of consent to a request for dissolution of Parliament (art 40(2)(b)); (iii) the Proclamation of Emergency (art 150(1)); (iv) the requisition of a meeting of the Conference of Rulers concerned solely with their privileges, position, honours and dignities (art 40(2)(c)); and (v) the prerogative of mercy (art 42).

[32] The powers of the YDPA are not limited to the executive branch of government. They also extend to the legislative and judicial branch of government. For the purposes of this judgment, I will only touch on the YDPA's legislative functions under the FC. The YDPA's legislative function includes the power to promulgate Ordinances during an emergency if the two Houses of Parliament are not in session concurrently: art 150(2B). More pertinent to this special case in hand, the YDPA is part of Parliament: art 44. The YDPA's legislative functions include the giving of the royal assent to Bills duly passed by Parliament (art 66(4)), and the summoning and prorogation of Parliament as advised by the Cabinet (art 55(2)).

Legislative power of Parliament

[33] Although Parliament is the supreme law-making body under the FC, Parliament's law-making powers are not unlimited. Parliament's powers are limited and defined in the FC itself. For example, Parliament's legislative powers are only exercisable subject to the conditions or restrictions relating to what laws may be made by Parliament and what laws may be made by state legislatures. Pursuant to art 74 and the Ninth Schedule, Parliament can legislate on 27 topics in the Federal List and 12 topics in the Concurrent List.

[34] The exercise of Parliament's legislative power is also regulated by the legislative procedure under art 66 of the FC. Article 66 sets out the process in which the legislative power is to be exercised, the assent of the YDPA to a Bill being one step in the process. Article 66 was amended by the three Amendment Acts from its original form as at Merdeka Day, to what it is today. The original cl (4) of art 66 provided that the YDPA's role was only to signify his royal assent to Bills duly passed by Parliament. The original clause reads as follows:

> (4) The Yang di-Pertuan Agong *shall signify his assent to a Bill* by causing the Public Seal to be affixed thereto, and after assenting to a Bill he shall cause it to be published as a law. (Emphasis added)

Constitutional Amendment Acts affecting art 66

[35] Article 66 was amended on three occasions. The first amendment took effect on *16 December 1983* when art 66(4) of the FC was amended by Act A566. It provided for automatic royal assent if assent was not forthcoming 15 days after a Bill is presented to the YDPA for his assent.

[36] On *20 January 1984*, art 66(4) was further amended by Act A584 by substituting for cll (4), (4), (4A) and (4B). Pursuant to this amendment, the YDPA must assent to a Bill within 30 days after a Bill is presented to him. However, he may within the period of 30 days return such Bill to the House with his written reasons for his objections to the Bill. When the Bill is returned to the House for consideration, and the Bill is re-enacted a second time, it shall be presented again to the YDPA for royal assent. If the YDPA still refused to give his assent within 30 days the Bill would be deemed to become law.

[37] On *24 June 1994*, cll (4) and (4A) of art 66 were amended to its current form by Act A885. The provision for the YDPA to send his written objections to Parliament, for Parliament to re-enact the Bill and for the YDPA to have a second thirty-day delay period were repealed. The effect of the amended cll (4) and (4A) is that when a Bill is presented to the YDPA, he shall assent to the Bill within 30 days failing which the Bill will be deemed to have been assented to and become law automatically — otherwise known as 'deemed royal assent'.

First Question: Are Acts A566, A584 and A885 unconstitutional?

[38] It has not been suggested that the three Amendment Acts in question were not passed strictly in accordance with the procedural requirements relating to Acts amending the FC. As such, it is only necessary to construe the provisions of the original art 66 and the three Amendment Acts to determine whether there is any merit in the appellant's arguments.

[39] The rules governing statutory interpretation may be summarised as follows. First, in construing a statute, effect must be given to the object and intent of the Legislature in enacting the statute. Accordingly, the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. The court will not read words into a statute unless clear reason for it is to be found in the statute itself. Therefore, in construing any statute, the court will look at the words in the statute and apply the plain and ordinary meaning of the words in the statute. Second, if, however the words employed are not clear, then the court may adopt the purposive approach in construing the meaning of the words used. Section 17A of the Interpretation Acts 1948 and 1967 provides for a purposive approach in the interpretation of statutes. Therefore, where the words of a statute are unambiguous, plain and clear, they must be given their natural and ordinary meaning. The statute should also be construed as a whole and the words used in a section must be given their plain grammatical meaning. It is not the province of the court to add or subtract any word; the duty of the court is limited to interpreting the words used by the Legislature and it has no power to fill in the gaps disclosed. Even if the words in a statute may be ambiguous, the power and duty of the court 'to travel outside them on a voyage of discovery are strictly limited.' Third, the relevant provisions of an enactment must be read in accordance with the legislative purpose and applies especially where the literal meaning is clear and reflects the purposes of the enactment. This is done by reference to the words used in the provision; where it becomes necessary to consider every word in each section and give its widest significance. An interpretation which would advance the object and purpose of the enactment must be the prime consideration of the court, so as to give full meaning and effect to it in the achievement to the declared objective. As such, in taking a purposive approach, the court is prepared to look at much extraneous materials that bears on the background against which the legislation was enacted. It follows that a statute has to be read in the correct context and that as such the court is permitted to read additional words into a statutory provision where clear reasons for doing so are to be found in the statute itself (*Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2020] 4 MLJ 721; [2020] 7 CLJ 561; [2020] 4 MLRA 394 (FC)).

[40] In my view, the wordings of the three Amendment Acts are clear and unequivocal and must therefore be given their natural and ordinary meaning. As this is a constitutional issue, an interpretation which would advance the object and purpose of the three Amendment Acts must be the prime consideration of this court. I have therefore alluded to the speeches of the Right Honourable Prime Minister when tabling the respective amendment Bills which led to the passage of the three Amendment Acts.

[41] For Act A566, *Penyata Rasmi Parlimen*, dated 3 August 1983 stated as follows:

> *Mengikut prinsip sistem demokrasi berparlimen yang diamalkan di negara kita, kuasa membuat undang-undang adalah hak Parlimen.* Sebagaimana Ahli-ahli Yang Berhormat sedia maklum, Parlimen terdiri daripada Yang Dipertuan Agong, Dewan Negara dan Dewan Rakyat, masing-masing dengan tugas dan tanggungjawabnya. Proses mewujudkan sesuatu undang-undang itu berakhir dengan Kebawah Duli Yang Maha Mulia Seri Paduka Baginda Yang Dipertuan Agong menurunkan tandatangan perkenan Baginda. Oleh kerana kadang-kala ada kemungkinan Duli Yang Maha Mulia Seri Paduka Baginda Yang Dipertuan Agong, atas sebab-sebab tertentu, *tidak dapat memberi perkenan kepada sesuatu rang undang-undang dengan segera, maka adalah dicadangkan supaya Perkara 66(5) dipinda bagi memperuntukkan bahawa selepas 15 hari rang undang-undang itu dipersembahkan kepada Baginda, maka hendaklah disifatkan bahawa Baginda telah pun memperkenankannya*.
>
> Tuan Yang Dipertua, sebenarnya seperti yang telah saya terangkan dalam ucapan saya pada permulaannya, pindaan yang dibuat ini cuma *untuk menjelaskan kedudukan yang sebenarnya supaya kekeliruan tidak timbul*. Dalam negara Raja Berperlembagaan (Constitutional Monarchy) dari segi Eksekutif yang berkuasa ialah Jemaah Menteri dan Perdana Menteri. *Untuk memenuhi formality* maka segala-gala yang dibuat telah *dibuat dengan nama Yang di-Pertuan Agong*, yang bertanggungjawab tetap Kabinet jika terjadi sesuatu apa. Jika rakyat tidak suka kepada apa yang dibuat ataupun apa-apa dasar atau undang-undang yang diluluskan maka yang menjadi sasaran ialah Kerajaan dan bukan Yang diPertuan Agong. (Emphasis added.)

[42] For Act A584, *Penyata Rasmi Parlimen*, dated 9 January 1984 stated as follows:

> Ini adalah peruntukan yang amat jelas sekali bahawa sebenarnya yang berkuasa ialah Jemaah Menteri, *tetapi untuk menentukan supaya kita mengadakan satu formality kita menentukan iaitu tiap-tiap sesuatu yang dibuat mestilah dibuat dengan nama Seri Paduka Baginda Yang di-Pertuan Agong*. Amalan ini, Tuan Yang Dipertua, bukan sahaja diamalkan di dalam negara kita tetapi diamalkan juga di negara-negara lain yang *mengamalkan sistem Raja Berperlembagaan (Constitutional Monarchy).*
>
> Tuan Yang Dipertua, dalam peruntukan ini kita telah berkata bahawa *selepas sesuatu undang-undang itu dipersembahkan Kebawah Duli dan jika di dalam masa 15 hari Kebawah Duli tidak menandatangani undang-undang ini maka dia dianggap sudah lulus*. Sebenarnya kalau dia tidak mempunyai kuasa yang sebenar, dan yang sebenarnya berkuasa ialah Jemaah Menteri, peruntukan ini bermakna bahawa yang hilang kuasa ialah Jemaah Menteri kerana Jemaah Menteri boleh menasihatkan Yang di-Pertuan Agong supaya menolak sesuatu undang-undang. Tetapi mengikut peruntukan ini kalau selepas 15 hari tidak ditandatangan maka dianya lulus. Jadi hak Jemaah Menteri untuk menasihat selepas 15 hari ini sudah pun tidak ada. Bagi Duli Yang Maha Mulia tidak ada kuasa ini, yang ada dahulu ialah Kabinet dan setelah dibuat peruntukan ini bermakna Kabinet yang kehilangan kuasa bukan Duli Yang Maha Mulia Seri Paduka Baginda Yang di-Pertuan Agong.

Di antara peruntukan yang tidak kemas ialah Perkara 66(5) di mana tafsiran boleh dibuat bahawa Parlimen sebenarnya tidak berkuasa dan tidak tertakluk kepada Perlembagaan. Oleh kerana tidak kemasnya peruntukan Perkara 66(5) ini maka telah timbul peristiwa-peristiwa di negeri-negeri yang mana buat satu jangkamasa Kerajaan Negeri memerintah di luar dari undang-undang. Supaya peristiwa seperti ini tidak berlaku lagi, maka perkara 66(5) perlulah diperkemaskan.

Tuan Yang Dipertua, ingin saya jelaskan di sini *bahawa kuasa Parlimen terkandung dalam Perkara 66(5). Pindaan yang dibuat bertujuan menghapuskan segala keraguan tentang hak Parlimen membuat rang undang-undang. Dalam tempoh 15 hari dipinda menjadi 30 hari campur 30 hari. Tetapi yang penting ialah tidak lagi ada keraguan tentang penggunaan syarat perkenan oleh Yang di-Pertuan Agong untuk menolak keputusan Parlimen*. Ini akan menentukan bahawa pentadbiran negara tidak akan terganggu dan peristiwa yang berlaku beberapa bulan yang lepas tidak akan berulang lagi.

Pindaan yang dikemukakan pada hari ini pada pendapat setengah-setengah pakar perlembagaan memberi kuasa baru kepada Yang di-Pertuan Agong *untuk mengambil bahagian secara langsung dalam penggubalan undang-undang*. Sebaliknya ada pendapat yang menyatakan bahawa Yang di-Pertuan Agong memang mempunyai kuasa tidak memperkenankan mana-mana undang-undang yang dilulus oleh Parlimen. Walau apa pun pendapat pakar-pakar, yang jelas ialah di bawah peruntukan asal Pekara 66 (5) Parlimen tidak terdaya mengambil apa-apa langkah yang diasaskan oleh Perlembagaan bagi mengatasi keengganan Yang di-Pertuan Agong memperkenankan mana-mana undang-undang yang dilulus oleh Parlimen. Pindaan baru yang dikemukakan hari ini *memberi jalan yang terang untuk mengatasi apa-apa kebuntuan jika sekiranya Baginda tidak bersetuju dengan apa-apa undang-undang yang diluluskan oleh Parlimen tertakluk kepada peruntukan-peruntukan lain dalam Perlembagaan yang menentukan kuasa mengikut budibicara Yang di-Pertuan Agong dan Majlis Raja-Raja*. (Emphasis added.)

[43] And for Act A885, *Penyata Rasmi Parlimen*, dated 9 May 1994 stated as follows:

Fasal 8 dalam Rang Undang-undang ini bertujuan meminda Perkara 66. *Pindaan ini akan memastikan agar suatu Rang Undang-undang tidak mengambil masa yang terlalu lama untuk menjadi undang-undang setelah diluluskan oleh kedua-dua Majlis Parlimen dan disembahkan untuk diperkenankan oleh Yang di-Pertuan Agong.*

Dengan pindaan kepada Fasal (4A) seperti yang dicadangkan, *melainkan dalam hal-hal yang menyentuh secara langsung keistimewaan Raja-Raja, sesuatu Rang Undang-undang akan tetap menjadi Rang Undang-undang setelah berakhir tempoh 30 hari ianya diluluskan oleh kedua-dua Majlis Parlimen.* Agar tidak ada yang akan cuba memutarbelitkan pindaan ini sebagai langkah untuk menggugat kemuliaan Raja-Raja, saya ingin mengulangi pendirian Kerajaan, bahawa pindaan dari segi hakikinya bukanlah baru. Ianya merupakan pindaan berbangkit atau, dengan izin, consequential amendment dari pindaan-pindaan sebelum ini. *Tujuannya ialah sekadar memaktubkan prinsip yang disepakati iaitu kedaulatan rakyat dan kewibawaan institusi legislatif yang mewakili kehendak rakyat.* Kemuliaan Raja-Raja akan terus dipertahankan dalam konteks Raja Berperlembagaan. (Emphasis added.)

[44] It may be gathered from the excerpts above that the rationale and purpose for the introduction of the three Amendment Acts are to affirm: (i) that Malaysia is a federal parliamentary constitutional monarchy; (ii) that the YDPA is a constitutional monarch; (iii) that the legislative power of making laws is vested in Parliament which represents the rakyat; (iv) that the giving of the royal assent is a formality and part of the legislative process; and (v) that the legislative process of enacting an Act which has been passed by both Houses of Parliament should not be unduly delayed.

[45] Whilst the YDPA is the formal head of the Executive branch of government (art 39), the YDPA is also a constituent part of Parliament (art 44). The former involves the performance of executive acts whilst the latter involves the performance of legislative acts.

[46] This distinction is borne out by the arrangement of the chapters in Part IV of the FC. It will be noted that Part IV bears the general heading 'The Federation'. There are six distinct chapters in Part IV. Chapter 1 bearing the sub-heading 'The Supreme Head' relates to the institution of the YDPA. Chapter 2 on 'The Conference of Rulers' deals with the institution of the Conference of Rulers. Chapter 3 relates to 'The Executive' and it provides for the role of the YDPA as the formal head of the Executive and that of the Cabinet of Ministers. Chapter 4 deals with 'Federal Legislature' which includes the composition of and matters affecting Parliament. Chapter 5 is a specific chapter on 'Legislative procedure'; and it is under this chapter that art 66 on the exercise of legislative power is housed. Chapter 6 concerns the capacity of the Federation as regards property, contracts, and suits.

[47] Article 44 under Chapter 4 provides that the legislative authority of the Federation shall consist of the YDPA and the two Houses of Parliament. Even though the YDPA is part of Parliament, the YDPA does not sit in Parliament. The role and functions of the YDPA vis a vis Parliament include the power to promulgate Ordinances during an emergency (art 150(2B)), the right to address one or both Houses separately or jointly (art 60), the power to summon or prorogue Parliament (art 55(1) and (2)), power to dissolve the Dewan Rakyat (art 55(2) and art 40(2)(b)), and the appointment of Senators (art 45(1)). The legislative procedure and exercise of legislative power is enumerated in art 66 — that Parliament has the power to make laws passed by both Houses of Parliament with the assent of the YDPA (art 66(4)).

[48] The YDPA's sole part in the legislative process of law making does not begin until the proposed law has been passed by both Houses and is presented for the royal assent. In this light, it cannot be gainsaid that the giving of the royal assent by the YDPA under art 66 is a legislative act as it is part of the legislative process. This finding is consistent with the shoulder note to art 66

which reads 'Exercise of legislative power'.

[49] That the ultimate responsibility of making laws rests with Parliament is reflected in the Reid Commission Report 1957 in para 64 on the following terms:

> We are directed to base our recommendations on Parliamentary democracy, and in our view the *principles of Parliamentary democracy require that ultimate responsibility should rest with that House of Parliament which has been elected by direct elections*. A Bill as passed by one House will go to the other House and any amendments made there will be sent back to the House in which the Bill originated. If these amendments are accepted *the Bill will become law on receiving the assent of the YDPA.* (Emphasis added.)

[50] In *Kirmani v Captain Cook Cruises Pty Ltd and another* (1985) 58 ALR 29, the royal assent has been described by the Australian High Court as 'part of the legislative process' (Brennan J at p 103) and as 'a step in a State legislative process.' (Dawson J at p 76). For the foregoing reasons, I am of the view that as the giving of the royal assent to Bills is an integral part of the legislative process it is therefore in the nature of a legislative act and not an executive act.

[51] Article 66(4) in its current form did not have any material or significant effect on the constitutional duty of the YDPA to give his royal assent to a Bill passed by Parliament. Under the original art 66(4), the YDPA's role was clear and unequivocal — the YDPA 'shall' signify his assent to a Bill but no time frame was provided for the giving of the royal assent. It follows that not only is the giving of the royal assent is a constitutional duty, it is also a non-discretionary power in the sense that the YDPA has no discretion to refuse to give his royal assent. In other words, once a Bill is presented to the YDPA for his assent, the YDPA is constitutionally bound to signify his assent to the Bill under art 66(4). In this connection, it is my considered view that the question of the YDPA acting on the advice of the Cabinet pursuant to art 40 does not arise. This is because the YDPA in the performance of this legislative act is under a constitutional duty to signify his assent to a Bill which is duly presented to him after the Bill has been passed by both Houses of Parliament.

[52] The three Amendment Acts were intended to prescribe a time period in which a Bill becomes law if not assented to by the YDPA. The inclusion of a time period does not detract from the YDPA's constitutional duty to give his assent to a Bill. If anything, it provides certainty and clarity by stipulating a time frame for the performance of that duty. In the event that the royal assent is not given at the expiry of the stipulated time period, the Bill shall be deemed to have been assented to and become law. As such, I do not think that there is any question of the removal of the YDPA's assent in the legislative process.

[53] Accordingly, I agree with the submission of the learned SFC that the three Amendment Acts did not introduce any substantive changes to the role and function of the YDPA in the giving of the royal assent to Bills under art 66 of the FC. Therefore, the issue of the three Amendment Acts offending the basic structure of the Constitution does not arise. Accordingly, the first constitutional question is answered in the negative.

Second question: Is the NSCA 2016 unconstitutional, null and void?

[54] The challenge against the constitutionality of the NSCA 2016 is mounted on three fronts. The first is that it became law pursuant to the three Amendment Acts because the NSCA 2016 came into force without the royal assent. However, in the light of my aforesaid ruling that the three Amendment Acts are not unconstitutional, the first point is without merit. I will now address the second point which relates to art 149 of the FC, and the third point on the violation of the freedom of movement under art 9(2) of the FC.

[55] The principles on the presumption of the constitutionality of statutes are well settled. Whenever the validity of an Act of Parliament is challenged, the court always start on the presumption that the statute is constitutional; for Parliament cannot be presumed to intend an unconstitutional action. It is therefore incumbent upon the appellant to satisfy the court that there has been a clear violation of arts 149 and 9(2) of the FC (*Ooi Kean Thong & Anor v Public Prosecutor* [2006] 3 MLJ 389; [2006] 2 CLJ 701; *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566; *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128); *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257; *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561).

[56] In essence, the appellant's argument is that the NSCA 2016 is a security law which comes within the ambit of art 149. That the NSCA 2016 arms the Executive with vast powers which impedes on the fundamental rights under arts 5, 9, 10 and 13 of the FC. That such basic rights can only be impeded if the NSCA 2016 was enacted under art 149 of the FC. And that as the NSCA 2016 was not passed under art 149, the NSCA 2016 is inconsistent with art 149 and is accordingly void under art 4(1) of the FC.

Article 149

[57] Article 149 of the FC reads as follows:

> 149 Legislation against subversion, action prejudicial to public order, etc.
>
> (1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation —

(a) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property; or

(b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or

(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or

(d) to procure alteration, otherwise than by lawful means, of anything by law established; or

(e) which is prejudicial to the *maintenance of the functioning of any supply or service to the public* or any class of the public in the Federation or any part thereof: or

(f) which is prejudicial to *public order* in, or the *security of, the Federation* or any part thereof,

any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of *Article 5, 9, 10 or 13*, or would apart from this Article be outside the legislative power of parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

(2) A law containing such a recital as is mentioned in Clause (1) shall, if not sooner repealed, cease to have effect if resolutions are passed by both Houses of Parliament annulling such law, but without prejudice to anything previously done by virtue thereof to the power of Parliament to make a new law under this Article. (Emphasis added.)

[58] The purpose of art 149 is to enable Parliament, once any one or more of the six categories of actions enumerated under paras (a)–(f) of cl (1) has occurred, to make laws providing not only for its suppression but also for preventing its recurrence. As such, art 149 confers Parliament with special power to legislate laws to combat subversion, actions against public order or national security. As can be seen, the scope of such actions is wide-ranging. Paragraphs (e) and (f) were added into cl (1) of art 149 pursuant to Constitutional Amendment Act 1978 (Act 442); the effect of which was to broaden the ambit of art 149 to deal with, not just with subversion, but with any social problem and public order issues by use of special powers transgressing the fundamental-rights provisions of the FC (See AJ Harding, *Law, Government and the Constitution in Malaysia* (1996) at p 209). To realize this declared objective of stopping or preventing such actions, art 149 has specifically empowered Parliament to pass laws which restrict the fundamental rights under art 5, 9, 10 or 13 of the FC. Where such an Act of Parliament enacted under art 149 confers on the Executive to act in a manner inconsistent with arts 5, 9, 10 or 13, the action must be taken bona fide for the purpose of stopping or preventing action of the kind envisaged under the Act (*Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 at p 54 (PC)).

[59] Accordingly, the notion that art 149 empowers the Executive is actually a misnomer. Article 149 empowers Parliament, not the Executive. Article 149 augments the powers of Parliament to enact special laws for the specified purposes. Article 149 does not endow the Executive with similar legislative competence. It must also be appreciated that this special power given to Parliament under art 149 is also independent of a state of emergency under art 150. In contrast, legislative competence under art 150 (on powers to combat emergency) is more extensive. Article 150 authorises Parliament (under art 150(5)) and the YDPA (under art 150(2B)) to make laws during an emergency; in the case of the YDPA, such legislative power is exercisable if the two Houses of Parliament are not in session concurrently. An emergency law under art 150 can suspend or restrict most provisions of the FC including all federal features and all fundamental rights, except for freedom of religion, citizenship or language (art 150(6A)).

[60] To invoke the protection of art 149, it is only necessary for an Act of Parliament to recite the following: (i) 'actions has been taken or threatened by any substantial body or persons, whether within or outside the federation', and (ii) any one or more of the six situations stipulated under paras (a)–(f) in cl (1) of art 149: *Selva Vinayagam a/l Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] 1 MLJ 601 (FC). An Act without the recitals prescribed under art 149(1) ranks as an ordinary law. It is not protected by the shelter of art 149 and may be subject to judicial review on constitutional grounds.

National Security Council Act 2016

[61] The question of whether the NSCA 2016 is a security law falls to be determined by reference to the real object and purpose of the Act and the key provisions contained therein.

[62] To determine this issue, I would apply the well-settled 'pith and substance' test — which enjoins the court to investigate the object, purpose and design of an enactment in order to ascertain the true character and substance of the legislation and the class of subject matter of legislation to which it really belongs (see *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119; [1988] 1 CLJ 11).

[63] The subject, scope and purpose of the NSCA 2016 is set out in the long title which reads as follows:

> An Act to provide for the establishment of the National Security Council, the declaration of security areas, the special powers of the Security Forces in the security areas and other related matters.

[64] Apart from the long title, there is no preamble or recital in the NSCA 2016 to elaborate on the reasons for passing the NSCA 2016. Be that as it may, it is clear from the long title that the purpose of the NSCA 2016 is to provide for the establishment of the National Security Council ('NSC'), the declaration of security areas and the special powers of the Security Forces in the security areas.

[65] An examination of the speeches of the Minister during the second reading of the NSCA Bill in Parliament will shed some light on the legislative purpose of the NSCA 2016. The relevant excerpts of the Minister's speech in the Dewan Rakyat on 3 December 2015 are as follows (at pp 85–87, Hansard):

> Tuan Yang di-Pertua, saya mohon mencadangkan *suatu akta untuk mengadakan peruntukan bagi penubuhan Majlis Keselamatan Negara, Pengisytiharan kawasan keselamatan, kuasa khas pasukan keselamatan di dalam kawasan keselamatan dan perkara lain yang berhubung dengannya* dibacakan kali yang kedua sekarang.
>
> ...
>
> Bentuk-bentuk ancaman yang kompleks dan dinamik ini memerlukan negara memperkukuhkan mekanisme dan sistem dalam penggubalan dasar-dasar keselamatan, perkongsian makluman perisikan dan tindak balas segera yang bersepadu oleh pasukan keselamatan *ke atas sesuatu insiden ancaman keselamatan yang di luar kemampuan sesebuah agensi. Ini kerana insiden keselamatan negara boleh berlaku pada bila-bila masa tanpa dapat dijangka seperti insiden keganasan yang berlaku di Perancis baru-baru ini*.
>
> Oleh yang demikian, *bagi memastikan keselamatan rakyat dan keselamatan negara, kerajaan memutuskan supaya mekanisme dan sistem pengurusan keselamatan negara* perlu diberi anjakan paradigma atau ditransformasikan supaya mampu menghadapi sebarang bentuk ancaman pada masa kini dan akan datang.
>
> ...
>
> Sehubungan dengan itu. Semua arahan MKN ini merupakan arahan yang dilaksanakan secara pentadbiran sahaja dan menjelaskan keberkesanan *menangani ancaman-ancaman keselamatan negara*. Pendekatan mewujudkan MKN secara formal melalui suatu perundangan bukanlah sesuatu yang baru. *Beberapa buah negara seperti Amerika Syarikat 1947, Jerman 1969, India 1998, Jepun 2013, Pakistan 2004, Filipina 1986, Rusia 1992, Thailand 2006, United Kingdom 2010 dan Vietnam 1992* telah memperoleh undang-undang berkaitan penubuhan National Security Council yang menjelaskan antara lain dari segi keahlian, fungsi dan juga kuasa penubuhan National Security Council. Rang Undang-undang MKN 2015 mengekalkan tugas, tanggungjawab dan peranan MKN sebelum ini dan menambah baik serta memperkasakan peranan MKN dan agensi-agensi berkaitan dalam menghadapi ancaman keselamatan negara masa kini dan juga mendatang. (Emphasis added.)

The relevant excerpts of the Minister's speech in the Dewan Negara when tabling the Bill on 21 December 2015 are as follows (at pp 24–28, Hansard):

> Tuan Yang di-Pertua, saya mohon mencadangkan *suatu akta untuk mengadakan*

A *peruntukan bagi penubuhan Majlis Keselamatan Negara, Pengisytiharan Kawasan keselamatan, kuasa khas pasukan keselamatan di dalam kawasan keselamatan dan perkara lain yang berhubung dengannya* dibacakan kali yang kedua sekarang.

...

B Tuan Yang di-Pertua, bagi memperkemas dan memperkukuhkan mekanisme pengurusan keselamatan negara terdapat keperluan untuk menubuhkan Majlis Keselamatan Negara (MKN) secara formal melalui perundangan seperti yang diperuntukkan di bawah rang undang-undang yang dicadangkan ini. Penubuhan MKN melalui perundangan adalah selaras dengan amalan terbaik antarabangsa atau international best practices, dengan izin, dalam mengukuhkan mekanisme

C pengurusan keselamatan negara *untuk menghadapi ancaman keselamatan negara yang semakin kompleks dan dinamik seperti National Security Act di Amerika Syarikat 1947, Filipina 1986, India 1998, Pakistan 2004, Antigua and Barbuda 2006, Thailand 2006, United Kingdom 2010 dan Jepun 2013* dan disuai padan dengan kehendak dan keperluan negara.

D Keperluan penggubalan rang undang-undang yang dicadangkan ini adalah berdasarkan pertimbangan kepada *tiga justifikasi penting* iaitu yang *pertama, menubuhkan MKN secara formal melalui perundangan* bagi mengukuhkan pengurusan keselamatan negara ...

Kedua, keperluan penyelarasan maklumat dan risikan dalam menangani ancaman

E *keselamatan negara... Insiden pencerobohan Lahad Datu pada tahun 2013* menunjukkan perlunya penyelarasan dan perkongsian maklumat dan risikan yang lebih efektif di kalangan entiti kerajaan dan pasukan keselamatan.

Ketiga, menyediakan mekanisme tindak balas segera secara bersepadu melibatkan pasukan keselamatan dalam kawasan yang diisytiharkan kawasan keselamatan.

F *Ancaman keselamatan negara ini semakin kompleks dan dinamik khususnya ancaman daripada pelaku bukan negara seperti kumpulan ekstremis dan radikal, ancaman insurgency, ancaman kumpulan militan dan sebagainya*. Justeru mekanisme tindak balas segera yang bersepadu perlu diwujudkan sebagai persediaan untuk menangani dan mengawal sesuatu ancaman keselamatan dalam kawasan keselamatan *tanpa mengisytiharkan darurat di bawah perkara 150 Perlembagaan Persekutuan*.

G *Rang undang-undang ini tidak dibuat di bawah Perkara 149, Perlembagaan Persekutuan*. Rang undang-undang ini dibuat di bawah kuasa Parlimen mengikut perkara 74(1) Perlembagaan Persekutuan yang dibaca bersekali dengan Butiran 2, dan Butiran 3, Senarai Pertama, Jadual Kesembilan, Perlembagaan Persekutuan, berhubung hal perkara pertahanan bagi persekutuan dan keselamatan dalam negeri.

H *Rang undang-undang ini juga tidak menjejaskan hak asasi yang dilindungi di bawah Perkara 5, Perkara 9, Perkara 10 dan Perkara 13, Perlembagaan Persekutuan. Oleh itu tidak ada keperluan supaya diadakan recital bagi menyatakan rang undang-undang ini dibuat di bawah Perkara 149, Perlembagaan Persekutuan*.

...

I *Takrif 'keselamatan negara', tidak diperuntukkan dalam rang undang-undang ini kerana bentuk ancaman keselamatan negara adalah dinamik dan berubah-ubah mengikut situasi semasa.* Ini adalah selaras dengan norma dan amalan antarabangsa kerana kebanyakan negara turut tidak mentakrifkan 'keselamatan negara' dalam undang-undang keselamatan mereka.

Walaupun tidak ada takrifan khusus diperuntukkan mengenai 'keselamatan negara' dalam rang undang-undang ini, 'keselamatan negara' dalam konteks Malaysia adalah seperti yang diperuntukkan dalam fasal 4(a) iaitu termasuklah kedaulatan, integriti wilayah, kestabilan sosial politik, kestabilan ekonomi, sumber strategik dan apa-apa kepentingan yang berkaitan dengan keselamatan negara.

...

Rang undang-undang ini merupakan suatu peruntukan undang-undang yang digubal bagi maksud memelihara ketenteraman awam dan keselamatan negara seperti yang dimaksudkan oleh Perkara 9(2), Perlembagaan Persekutuan. Maka, kebebasan bergerak dalam kawasan keselamatan yang diisytiharkan adalah tertakluk kepada rang undang-undang ini. Kuasa kepada Majistret atau Koroner untuk mengenepikan pengadaan siasatan kematian atau inkues ke atas mayat merupakan kuasa budi bicara jika dia berpuas hati bahawa orang itu telah terbunuh di dalam kawasan keselamatan akibat operasi yang dijalankan oleh pasukan keselamatan.

[66] In the Explanatory Statement to the NSCA Bill 2015 (DR 38/2015), the purpose is expressed in the following passage:

Akta Majlis Keselamatan Negara 2015 yang dicadangkan ini ('Akta yang dicadangkan') bertujuan untuk menubuhkan Majlis Keselamatan Negara dengan kuasa, antaranya, untuk mengawal dan menyelaras, dan untuk mengeluarkan arahan kepada, Entiti Kerajaan mengenai perkara yang berkaitan dengan keselamatan negara. Akta yang dicadangkan juga memberi Perdana Menteri kuasa, atas nasihat Majlis, untuk mengisytiharkan kawasan tertentu di Malaysia sebagai kawasan keselamatan. Kuasa khas diberikan kepada Pasukan Keselamatan di dalam kawasan Keselamatan.

[67] It can be surmised from the Minister's speeches and the Explanatory Statement that the legislative purpose of the NSCA 2016 the establishment of the NSC in order to: (i) strengthen the measures to guard and maintain the sovereignty of the country; (ii) to preserve *national security*; (iii) to declare security areas; and (iv) to control and coordinate Government entities on operations concerning *national security*.

[68] Although the words 'national security' ('keselamatan negara') are not defined in the NSCA 2016, the scope and tenor of national security may be inferred from a reading of para (a) in s 4 which is as follows:

4. The Council shall have the following functions:

(a) to formulate policies and strategic measures on *national security*, including *sovereignty, territorial integrity, defence, socio-political stability, economic stability, strategic resources, national unity and other interests relating to national security*.

(b) ...

(c) ...

(d) ... (Emphasis added.)

[69] National security appears to have been given a wide scope such as to encompass the range of matters under para (a) in s 4. Given the diverse factors attributed to national security, it is not inconceivable that matters falling under national security would also include situations such as natural disasters like floods, landslides, earthquakes and pandemics.

[70] The NSC is the Government's central authority on matters concerning national security: s 3 of the NSCA 2016. The NSC's functions include the following: (i) to formulate policies and strategic measures on national security; (ii) to monitor the implementation of the policies and strategic measures on national security; (iii) to advise on the declaration of security areas; and (iv) to perform any other functions relating to national nsecurity: s 4 of the NSCA 2016. The person directly responsible to the NSC is the Director General ('DG'): s 15. The DG is tasked with the overall supervisory and monitoring functions on the implementation of the policies and strategic measures on national security: s 16.

[71] Two important features stand out in the NSCA 2016. The first relates to power of the YDPA to make a declaration of an area as a security area under s 18(1) of the NSCA 2016 which reads:

18 Declaration of security area

(1) Where the Council advises the Yang di-Pertuan Agong that the *security in any area in Malaysia is seriously disturbed or threatened by any person, matter or thing which causes or is likely to cause serious harm to the people, or serious harm to the territories, economy, national key infrastructure of Malaysia or any other interest of Malaysia*, and requires immediate national response, the Yang di-Pertuan Agong may, if he considers it to be necessary *in the interest of national security, declare in writing the area as a security area.* (Emphasis added.)

[72] This provision on the declaration of a security area on the grounds of threats to the security, social and economic life or public order is not unlike that for the invocation of an emergency under art 150(1) of the FC. As can be seen, the similarities between the provisions of s 18 of the NSCA 2016 and art 150 insofar as they relate to national security, public order and economic life are quite striking. Article 150(1) reads as follows:

150 Proclamation of emergency

(1) *If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security, or the economic life, or public order* in the Federation or any part thereof is threatened, he may issue a Proclamation of Emergency making therein a declaration to that effect. (Emphasis added.)

[73] The *second* important feature concerns the invocation of special powers once a security area is declared. These special powers are housed under Part V of the NSCA 2016 bearing the heading 'Special Powers of the Director of Operations and Security Forces Deployed to the Security Area'. Under the NSCA 2016, the Director of Operations ('DOO') is empowered to: relocate or exclude any person from a security area (s 22); impose a curfew in a security area (s 23); control the freedom of movement in a security area (s 24); take possession of land, building or movable property in any security area (s 30); demand for use of resources (s 31); and order destruction of unoccupied buildings in any security area (s 33). The Security Forces have the power of arrest without warrant of any person alleged to have committed or reasonably suspected of having committed any offence in the security area (s 25); and power of search and seizure (ss 26–29). Equally significant is the power of the DG of the NSC to decide on the compensation for properties taken under ss 30, 31, and 33.

[74] In the light of the foregoing, it is clear that the NSCA 2016 is a security law containing sweeping powers which restricts fundamental liberties.

Fundamental liberties

[75] Are the fundamental liberties guaranteed under the FC inviolate? The nine articles on fundamental rights are not equal in the sense that some of these rights permit of no derogation in ordinary times whilst other fundamental rights may be limited on specified grounds. The former category are rights which are expressed in absolute language prohibiting Parliament from circumventing them by ordinary laws — they include the art 6 right against slavery and forced labour, the art 7 right against backdated criminal laws and repeated trials, the art 8 right to equality before the law, freedom of religion under art 11, and right to education under art 12. The latter category rights are those rights which may be limited on specific grounds, otherwise described as permissible restrictions — arts 5, 9, 10 and 13.

Permissible restrictions on fundamental liberties

[76] For the purposes of this judgment, I will only set out the permissible restrictions relating to arts 5, 9, 10 and 13. As can be seen below, arts 5, 9, 10 and 13 provide that the rights in question may be subordinated on the following terms.

Fundamental Liberties	Permissible Restriction(s)
Article 5 Liberty of the person	'... save in accordance with law.' (art 5(1))

Article 9 Prohibition of banishment and freedom of movement	'Subject to Clause 3 and to any law relating to the security of the Federation or any part thereof, public order, public health, or the punishment of offenders, ...' (art 9(2))
Article 10 Freedom of speech, assembly and association	'Parliament may by law impose' — (a) on freedom of speech and expression, 'such restrictions as it deems necessary or expedient in the interest of the security of the Federation ..., public order or morality ...'; (b) on right to assemble peaceably and without arms, 'such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, or public order'; (c) on the right to form associations, 'such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality.' (art 10(2)(a), (b) & (c))
Article 13 Rights to property	'... save in accordance with law.' (art 13(1))

[77] There are two discernible categories of permissible restrictions. The *first category* is quite broad as it permits of restrictions in accordance with law — art 5(1) *Right to Personal Liberty* and art 13(1) *Rights to Property*. In contrast, the *second category* is more specific in the sense that the grounds permitted are limited by the FC. Article 9(2) authorises Parliament to restrict *freedom of movement* on four grounds: national security, public order, public health, or the punishment of offenders. Article 10(2)(a) authorises Parliament to restrict *freedom of speech* on eight grounds: national security, friendly relations with other countries, public order, morality, incitement to any offence, defamation, contempt of court, or privileges of Parliament. Article 10(2)(b) on the *right of assembly* may be restricted on two grounds: national security or public order. And art 10(2)(c) on the *right of association* may be restricted on three grounds: national security, public order, or morality.

[78] There is another important aspect of permissible restrictions relating to arts 5, 9, 10 and 13. As the word 'law' in the FC is defined to include the FC, Acts of Parliament, Ordinances and Enactments (see art 160(2); ss 3 and 66 of the Interpretation Acts 1948 and 1967), it follows that restrictions on art 5, 9, 10 or 13 may be imposed by: (i) the provisions of the FC; or (ii) Acts of Parliament.

[79] Examples of permissible restrictions imposed by Acts of Parliament include — (i) *the rights to property under* art 13 under the Land Acquisition Act 1960 (s 3 on acquisition of land, s 19 on power to take possession in urgent cases, and s 40D on decision of the court on compensation), Prevention and Control of Infectious Diseases Act 1988 (s 20 on prohibition to selling or letting a building where there is or has been a case of infectious disease, s 26 on temporary requisition of any premises for purposes of carrying out said Act); and (ii) *the art 5 right to personal liberty* is restricted under a number of Acts of Parliament including the Public Order (Preservation) Act 1958 (s 13 on the control of persons in a proclaimed area), Dangerous Drugs Act 1952, Firearms (Increased Penalties) Act 1971, Kidnapping Act 1961, Police Act 1967, and the Criminal Procedure Code.

[80] The *right to freedom of movement under* art 9 is subject to 'any law' under cl (2) and may be restricted by an Act of Parliament and/or by a provision in the FC. There is, however, an important proviso — that the permissible restriction must be on grounds relating to national security, public order, public health, or punishment of offenders. Acts of Parliament imposing restrictions on freedom of movement include the (Immigration Act 1959/63 ss 3(2), 62–74), Public Order (Preservation) Act 1958 (s 5 on control of person), Income Tax Act 1967 (s 104), Police Act 1967 (ss 26 and 31), Prevention and Control of Infectious Diseases Act 1968 (ss 14 and 15), and (Protected Areas and Protected Places Act 1959 ss 4 and 5).

[81] Similarly, art 10 rights may only be restricted on specific grounds. The permissible restrictions on the *freedom of speech and right of association* must relate to grounds of national security, public order or morality; whereas the restrictions on the *right of assembly* is limited to national security or public order. Restrictions imposed on *freedom of speech* under Acts of Parliament include the (Sedition Act 1948, ss 4 and 9), Official Secrets Act 1972 (s 8), Printing Presses and Publications Act 1984 (ss 4, 7 and 8), Defamation Act 1957 (ss 4, 5, 6, and 7), Communications and Multimedia Act 1998 (s 233), Film (Censorship) Act 2002 (ss 5, 9 and 10), Indecent Advertisements Act 1952 (ss 3, 5 and 6) and Penal Code (s 499, 504, 505). Permissible restrictions on the *right of assembly* are imposed under the Peaceful Assembly Act 2012 (ss 4, 9 and 15), and Penal Code (s 141). The right of association is similarly subordinated under the Societies Act 1966, and the Universities and University Colleges Act 1971.

[82] In essence, the permissible restrictions relating to arts 9 and 10 are limited principally on grounds of national security or public order; whereas those in respect of arts 5 and 13 are not subject to such limits.

Is the NSCA 2016 a security law that must be enacted under art 149?

[83] The use of the words 'Special Powers' in Part IV of the NSCA 2016 is not without significance or import. Firstly, it signifies that these special powers are only exercisable under the following exceptional circumstances — where 'the security in any area in Malaysia is seriously disturbed or threatened by any person, matter or thing which causes or is likely to cause serious harm to the people, or serious harm to the territories, economy, national key infrastructure of Malaysia, or any other interest of Malaysia': s 18 of the NSCA 2016. Put another way, the Act is designed to combat *subversion, actions prejudicial to public order or national security*. Secondly, a perusal of these special powers -the power of arrest without distinction between seizable or non-seizable offences, the power to impose curfews and relocate persons, the power to control movement, the power to take temporary possession of land, building or movable property and the assessment of the compensation by the DG — clearly shows that these special powers are sweeping and far-reaching and not unlike emergency powers.

[84] Be that as it may, does it automatically follow that since the NSCA 2016 is a security law which transgresses on fundamental rights, it is void for being inconsistent with the FC. In the light of the permissible restrictions discussed above, I do not think that the NSCA 2016 is automatically void under art 4(1) of the FC. In my considered view, the constitutionality of the NSCA 2016 vis a vis art 149 of the FC may be determined by reference to the true character and substance of the six Acts passed under the authority of art 149. They are:

(a) Internal Security Act 1960 [Act 82], since repealed;

(b) Dangerous Drugs (Special Preventive Measures) Act 1985 [Act 316];

(c) Dangerous Drugs (Forfeiture of Property) Act 1988 [Act 340];

(d) Security Offences (Special Measures) Act 2012 [Act 747];

(e) Prevention of Terrorism Act 2015 [Act 769]; and

(f) Prevention of Crime Act 1959 [Act 297].

Internal Security Act 1960 ('the ISA')

[85] I will begin with the ISA. The ISA ranked as the most well-known legislation under art 149. Its validity has been repeatedly challenged and the Courts have been unanimous that the law is perfectly permissible under art 149 (Shad Saleem Faruqi. *Document of Destiny, The Constitution of the Federation of Malaysia*, Star Publications 2008 at p 663). According to the long title the ISA is an Act 'to provide for the internal security of Malaysia, preventive detention, the prevention of subversion, the suppression of organized violence against persons and property ...'. The recitals in the ISA are consistent with paras (a), (d) and (f) in cl (1) of art 149. The ISA is divided into four parts. Part II on 'GENERAL PROVISIONS RELATING TO INTERNAL SECURITY' sets

out: (i) special powers to order preventive detention or restriction of persons (ss 8–21 under Chapter II); (ii) special powers relating to subversive publications (ss 22–31 of Chapter III), control of entertainment and exhibitions (ss 32–41 of Chapter IV), and powers to prevent subversion in educational institutions (ss 41A–42 of Chapter V). Part III on 'SPECIAL PROVISIONS RELATING TO SECURITY AREAS' contain provisions on proclamation of security areas (s 47 of Chapter I), (ii) powers for the preservation of public security (ss 48–56 of Chapter II), offences relating to security areas (ss 57–63A of Chapter III), powers of Police and others of arrest and search, and power to dispense with inquests (ss 64–67 of Chapter IV), and compensation for property taken or used (ss 68 of Chapter V). The ISA was repealed in 2012 and in its place, Parliament enacted the Security Offences (Special Measures) Act 2012.

Security Offences (Special Measures) Act 2012 ('the SOSMA')

[86] SOSMA is an Act to provide for special measures relating to security offences for the purpose of maintaining public order and national security. SOSMA was enacted pursuant to paras (a), (b), (d) and (f) in cl (1) of art 149. Part II on 'SPECIAL POWERS FOR SECURITY OFFENCES' provides for the power of arrest without warrant and detention for an initial period of twenty-four hours and thereafter for a period of up to twenty-eight days for the purpose of investigation (ss 4–5). There are also other special procedures relating to: (i) electronic monitoring device (s 7); (ii) sensitive information (ss 8–11); (iii) protected witnesses (ss 14–16), (iv) evidence (ss 17–26); and (v) trial of security offences by the High Court and on bail (ss 12–13).

Dangerous Drugs (Special Preventive Measures) Act 1985 ('the DDSPMA')

[87] The DDSPMA provides for the preventive detention of persons associated with or involved in trafficking of dangerous drugs; and it also recites para (f) in cl (1) of art 149 on public order and national security. The primary powers under DDSPMA includes the power to order preventive detention and restriction of persons; the power to arrest a person without a warrant, detain suspected persons, the role of an Inquiry Officer, representation against detention orders, review and the functions of the Advisory Board, Minister's power to extend or revoke a detention order (ss 3, 5, 6, 7, 9, 10, 11, 11A and 11B).

Prevention of Terrorism Act 2015 ('the POTA')

[88] POTA provides 'for the prevention of the commission or support of terrorist acts involving listed terrorist organizations in a foreign country, or any part of a foreign country and for the control of persons engaged in such acts ...'. Though para (f) in cl (1) of art 149 is recited in the preamble to POTA, the

recital is only limited to action which is prejudicial to national security. POTA provides for the arrest without a warrant of a person on the grounds which would justify the holding of an inquiry under POTA (s 3) and the power to order preventive detention and restriction (s 13). The arrestee is liable to be remanded for an initial period of 21 days and an extension of 38 days (s 4). POTA also provides for the appointment of an inquiry officer, the establishment of a Prevention of Terrorism Board with powers to hold inquiries and to make, extend, suspend or revoke detention and restriction orders (ss 8–18).

Prevention of Crime Act 1959 ('the POCA')

[89] POCA provides 'for the more effectual prevention of crime throughout Malaysia and for the control of criminals, members of secret societies, terrorists and other undesirable persons ...'. Paragraph (a) in cl (1) of art 149 on organised violence is recited in the preamble to POCA. The emphasis in POCA is also on preventive detention which includes the power to order detention (s 19A) and police supervision (s 15) — a person arrested under POCA is subject to similar procedures for remand as in POTA. A person suspected of being likely to be a member of an unlawful society or of any of the registrable categories under the First Schedule is liable to be arrested without a warrant and detained. A person believed to be such a member may by order of the Prevention of Crime Board be detained for a period of up to two years, renewable for a further period of up to two years at a time (ss 10A and 19A) or subject to a police supervision order (s 15).

Dangerous Drugs (Forfeiture of Property) Act 1988 ('the DDFOPA')

[90] DDFOPA relates to 'offences in relation to property, and for the seizure and forfeiture of property, connected with activity related to offences under this Act, the Dangerous Drugs Act 1952, or any foreign law corresponding to these Acts or to the provisions of offences under these Acts; for assistance to foreign countries in relation to matters connected with dangerous drugs ...'. Paragraph (f) in cl (1) of art 149 on public order and national security is adopted in the preamble. DDFOPA provides for the powers of arrest without a warrant, investigation and seizure of movable and immovable property, including that of a business — defined as 'illegal property' under s 2. It lays out the procedure for the forfeiture of property and the vesting of forfeited property in the Government without compensation. Under DDFOPA, the rights to property and the right to receive adequate compensation have also been curtailed.

[91] So much for the six art 149 Acts. In my view, whether a security enactment comes under the ambit of art 149 falls to be determined by an examination of: (i) the nature, character and extent of the powers given to the

Executive under the enactment in question; and (ii) the purpose(s) of the enactment.

[92] In this regard, a close scrutiny of the ISA and the NSCA 2016 will shed light into the real nature of the NSCA 2016. There are provisions in the NSCA 2016 which are strikingly similar to the ISA in character and substance. In particular, there are similar provisions on the power of declaration of a security area (s 47 ISA; s 18 NSCA 2016), the powers relating to security area which include the power of arrest without warrant (ss 45 and 64 ISA; s 25 NSCA 2016), power to impose a curfew (s 52 ISA; s 23 NSCA 2016), power to control movement (ss 49–51 ISA; s 24 NSCA 2016), power to relocate persons (ss 48–51 ISA; s 22 NSCA 2016), power to take possession of property (s 53 ISA; s 29 NSCA 2016), power to destroy property (s 54 ISA; s 33 NSCA 2016), power to assess compensation for property taken (s 68 ISA; s 32 NSCA 2016), and power to make regulations (s 71 ISA; s 42 NCSA 2016). Indeed, the foregoing powers under the NSCA 2016 are styled as 'special powers'. In my considered view, the foregoing powers under the ISA may also be described as 'special powers' because they are housed under Part III of the ISA which carries the heading 'SPECIAL PROVISIONS RELATING TO SECURITY AREAS.'

[93] In the context of this special case, the power of the YDPA to make a proclamation of security areas under sub-s 47(1) of the ISA is also significant. Subsection 47 of ISA reads:

> 47 Proclamation of security areas
>
> (1) If in the opinion of the Yang di-Pertuan Agong public security in any area in Malaysia is seriously disturbed or threatened by reason of any action taken or threatened by any substantial body of persons, whether inside or outside Malaysia, to cause or to cause a substantial number of citizens to fear organised violence against persons or property, he may, if he considers it to be necessary for the purpose of suppressing such organised violence, proclaim that area as a security area for the purposes of this Part.

[94] Pursuant to sub-s 47(1) of ISA, the proclamation of a security area is predicated upon the circumstances described under paras (a) and (f) in cl (1) of art 149; and these relate to organised violence, public order or national security. Accordingly, the exercise of the power of proclamation of security areas is consonant with the recitals in the ISA pursuant to art 149 of the FC.

[95] In addition, a scrutiny of the recitals contained in the six art 149 Acts show that except for POCA, all the other five art 149 Acts have cited threats or action against *public order* or *national security* as the *raison d'être* for the protection of art 149. The ISA adopts paras. (a), (d) and (f) in cl (1) of art 149, SOSMA contains paras (a), (b), (d) and (f), DDSPMA, POTA and DDFOPA

contain para (f). These are almost identical to the criteria for the declaration of a security area under s 18 of the NSCA 2016 – 'the security in any area in Malaysia is seriously disturbed by any person, matter or thing which causes or is likely to cause serious harm to the people, or serious harm to the territories, economy, national key infrastructure of Malaysia ...'; words highly evocative of the opening paragraph in cl (1) of art 149 and fit closely within the situations described in paras (a), (e) and (f) thereof.

[96] It is equally important to note that pursuant to art 149, only four fundamental rights may be restricted — (i) the art 5 *right to personal liberty*; (ii) the art 9 *freedom of movement*; (iii) the art 10 *freedom of speech*, *assembly and association*; or (iv) the art 13 *rights to property*. Five of the six art 149 Acts contain restrictions on some but not all of these four fundamental rights. In particular, SOSMA, DDSPMA, POTA and POCA restrict arts 5 and 9 whilst the DDFOPA restricts arts 5 and 13. However, the ISA is the only exception. The ISA stands out as it is the only art 149 Act which contains restrictions on not one, not two, but on all of the four fundamental liberties specifically permitted under art 149 of the FC. In this light, the ISA is a very potent law because of its wide reach.

[97] In this connection, it is noteworthy that apart from the ISA, the NSCA 2016 is the only other Act that circumscribes all the four arts 5, 9, 10 and 13 fundamental liberties explicitly permitted under art 149. This singular feature fortifies my view that notwithstanding that the NSCA 2016 is only an ordinary piece of legislation, it is nevertheless a potent security law much like the ISA. In my considered view, any proposed national security law which permits of such serious violations of all the four fundamental liberties guaranteed under arts 5, 9, 10 and 13 of the FC should have come under critical scrutiny and fully debated in Parliament, and properly enacted under the authority of art 149.

[98] Notwithstanding the foregoing, the NSCA 2016 was only enacted as an ordinary law. During the reading of the NSCA Bill, the Minister informed Parliament that the proposed NSCA Act was a law on national security and public order. However, the Minister assured the House that it was not necessary to include the recital under art 149 in the NSCA 2016 because the Act does not infringe the fundamental liberties under arts 5, 9, 10 and 13 of the FC — 'Rang undang-undang ini tidak dibuat di bawah Perkara 149 Perlembagaan Persekutuan ... *Rang undang-undang ini juga tidak menjejaskan hak asasi yang dilindungi di bawah Perkara 5, Perkara 9, Perkara 10 dan Perkara 13, Perlembagaan Persekutuan.* Oleh itu tidak ada keperluan supaya diadakan recital bagi menyatakan rang undang-undang ini dibuat di bawah Perkara 149, Perlembagaan Persekutuan'.

[99] It is clear that the Minister's statement that the NSCA 2016 will not

impinge on the arts 5, 9, 10 and 13 fundamental liberties was not an accurate representation of the true nature and character of the NSCA 2016. I say this for two reasons. First, as adumbrated above, there are clear provisions in the NSCA 2016 which contravene the fundamental rights under arts 5, 9, 10 and 13 of the FC. Second, the Minister contradicted himself in a later part of his speech in the Dewan Negara when he remarked that the freedom of movement in a security area would be restricted — 'Rang undang-undang ini merupakan suatu peruntukan undang-undang yang digubal bagi maksud memelihara ketenteraman awam (public order) dan keselamatan negara (national security) seperti yang dimaksudkan oleh Perkara 9(2) Perlembagaan Persekutuan. *Maka, kebebesan bergerak dalam kawasan keselamatan yang diisytiharkan adalah tertakluk kepada rang undang-undang ini* ...'.

[100] On 11 January 2021, the YDPA issued a Proclamation of Emergency under art 150 of the FC 'by reason of the existence of a grave emergency threatening the security, economic life and public order of the Federation arising from the epidemic of an infectious disease', namely, the Covid-19 pandemic. In the fight against the Covid-19 pandemic, it is especially pertinent to note that the NSC is the designated lead agency and the Government's central authority. The NSC has the power of controlling, coordinating and issuing directives to all 'Government Entities' (defined as any ministry, department, office, agency, authority, commission, board or council of the Federal Government, or of any of the State Governments, local authorities and the Security Forces: see s 2 of the NSCA 2016) on operations concerning national security. The NSC consists of eight members — (i) the Prime Minister as Chairman, (ii) the Deputy Prime Minister as Deputy Chairman, (iii) the Minister of Defence, (iv) the Minister for Home Affairs, (v) the Minister of Multimedia and Communications, (vi) the Chief Secretary to the Government, (vii) the Chief of Defence Forces, and (viii) the Inspector General of Police (s 6 of the NSCA 2016). Against this backdrop, it is clear that the NSC is a very powerful organ with special powers to curtail fundamental liberties during the period of the emergency. The fact of the NSC being the lead agency in an emergency underscores the true nature and character of the NSCA 2016 — that the NSCA 2016 is a security law with emergency-like powers that falls within the ambit of art 149. The Proclamation of Emergency has since lapsed on 1 August 2021.

[101] As the Covid-19 pandemic is a public health issue, the Minister's reference to cl (2) of art 9 of the FC is equally pertinent. Clause (2) states — 'Subject to ... any law relating to the *security of the Federation* or any part thereof, *public order, public health*, or the punishment of offenders, every citizen has the right to move freely throughout the Federation and to reside in any part thereof'. In my view, the inclusion of public health as an aspect of public order and national security within the context of NSCA 2016 does not detract from

the true character and purpose of the NSCA 2016. This is underscored by the words of s 18 of the NSCA 2016 which provides the basis for the invocation of the special power to declare a security area and the matters relating to national security under para (a) in s 4 of the NSCA 2016. Public health (including special measures to combat the Covid-19 pandemic) is therefore an integral aspect of the legislative scheme under s 18 of the NSCA 2016.

[102] Further, in the context of para (f) in cl (1) of art 149, the expressions 'public order' and 'the security of the federation' are synonymous and not mutually exclusive. 'Public order' means the tranquility and security which every person feels under the protection of the law, a breach of which is an invasion of the protection which the law affords (*Board of Commissioners of Peace Officers Annuity and Benefit Fund v Clay* 102 SE 2d 575 at p 577). In *Re Application of Tan Boon Liat @ Allen; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1976] 2 MLJ 83, Abdoolcader J adopted the view that the maintenance of public order is equated with the maintenance of public tranquility, and that public safety is a part of the wider concept of 'public order. His Lordship remarked 'that 'public safety' ordinarily means security of the public or their freedom from danger and in that sense will include the *securing of public health*, that is to say, anything which tends to prevent dangers to the public health may also be regarded as securing public safety.' At p 86 of the report, His Lordship said:

> The expression 'public order' is not defined anywhere but danger to human life and safety and the disturbance of public tranquility must necessarily fall within the purview of the expression. It is used in a generic sense and is not necessarily antithetical to disorder, and is wide enough to include considerations of public safety within its signification. The Supreme Court of India exhaustively discussed the import of the term 'public order' in *Romesh Thappar v State of Madras* AIR 1950 SC 134 at 127 (in particular at p 127) when it established the principle that the maintenance of public order is equated with the maintenance of public tranquility, that 'public safety' is a part of *the wider concept of 'public order'*, that 'public safety' ordinarily means security of the public or their freedom from danger and in that sense will include the securing of public health, that is to say, *anything which tends to prevent dangers to the public health may also be regarded as securing public safety*. (Emphasis added.)

[103] For completeness, I will address learned SFC's argument that legislation on national security like the NSCA 2016 involves policy considerations which are within the preserve of the Executive. Learned SFC submitted that: (i) the courts in this country have always been circumspect in reviewing legislation dealing with national security; and (ii) the courts will defer to the judgment of the Executive on such issues as only the Executive may possess exclusive information on the matter. *Kerajaan Malaysia & Ors v Nasharuddin Nasir*, a case on preventive detention under the ISA was cited in support of that proposition.

[104] In *Nasharuddin Nasir*, Nasharuddin Nasir ('NN') filed a writ of habeas corpus to challenge the validity of his police detention under s 73(1) of the ISA. At the hearing of NN's application in the High Court, the DPP took a preliminary objection that the s 73 detention had been superseded by a ministerial detention order under s 8 of the ISA. Nevertheless, the learned judge overruled the objection and proceeded to hear the application against the ministerial detention order under s 8 and issued a writ of habeas corpus for NN's release. On appeal to the Federal Court, two questions arose for consideration: (i) whether the Minister, by defending the legality of his detention order, and filing an affidavit therefor, had submitted to the court's jurisdiction; and (ii) whether s 8B of the ISA had ousted the review jurisdiction of the High Court, and in any case whether the learned judge had failed to consider the operation and constitutionality of that section. In answer to the first question, the Federal Court opined that as the Minister had filed his affidavit consequent upon the learned judge's decision to hear the complaint against the s 8 ministerial detention order, it cannot be said that the Minister had submitted to the court's jurisdiction without qualification. On the second question, the Federal Court held that the s 8B ouster clause falls within the parameters of art 149(1) and is not unconstitutional. The Federal Court also opined that (i) in *habeas corpus* proceedings, the question whether it is necessary that a person be detained under s 8 of the ISA is a matter for the personal or subjective satisfaction of the executive authority; (ii) matters of national security have always been considered by the courts to have a peculiar texture and have called for special treatment; (iii) in matters of preventive detention relating to national security, the judges are the Executive; (iv) where policy considerations were involved in administrative decisions and courts did not possess knowledge of the policy considerations which underlie such decisions, courts ought not to review them; and (v) where matters of national security and public order are involved, the court should not intervene by way of judicial review or be hesitant in doing so as these are matters especially within the preserve of the Executive, involving as they invariably do, policy considerations and the like.

[105] In my considered view, learned SFC's argument is misconceived for the following reasons. First, unlike *Nasharuddin Nasir*, this special case is not a habeas corpus proceeding. This special case is about the constitutionality of the NSCA 2016 vis a vis art 149 of the FC. Second, this special case does not involve a review of an administrative decision under the NSCA 2016. There is no ministerial or administrative decision to be reviewed in this special case. It follows that policy considerations for administrative decisions have no relevance and are wholly immaterial to these proceedings. Third, the ISA is an Act passed under art 149 whereas the NSCA 2016 is not. It was on the basis that the ISA was an art 149 Act that the Federal Court decided that the ouster clause in s 8B was not unconstitutional. Accordingly, *Nasharuddin Nasir* is clearly distinguishable on the facts and on the law. The principles propounded

in *Nasharuddin Nasir* are therefore inapplicable in this special case.

[106] In the final analysis, this special case is about the *supremacy of law*. The expression 'supremacy of law' is used in contradistinction to supremacy of Parliament. In England, where there is no written constitution, it is a constitutional fundamental that the British Parliament is supreme. As such, the British Parliament may pass any law it so wishes, subject to compliance with the necessary legislative procedure. That, it must be stressed, is not the position in Malaysia. Malaysia is a federation constituted under a written constitution (see art 1 of the FC). It is based on a parliamentary system of Government with a constitutional monarchy. The FC itself provides that it is the Constitution, and not Parliament, which is supreme (art 4(1)). In this context, the expression 'supremacy of law' is taken to mean that *the Constitution as law is the supreme authority in Malaysia*. Accordingly, it follows that under our constitutional scheme, the Constitution is supreme over Parliament, the Executive or even the Judiciary. Therefore, whatever may have been the policy considerations behind the tabling of the NSCA Bill in Parliament, any Bill which falls within the class of subject matter of legislation under art 149 must nevertheless be enacted under the authority of art 149. To enact otherwise would be ultra vires the legislative powers of Parliament (art 128). Consequently, such a law may be subject to judicial review on constitutional grounds (art 4(1)).

[107] The Judiciary is the third branch of Government and it is independent from the Executive and Legislative branches. The Judiciary is vested with the powers and responsibilities of upholding and interpreting the provisions of the FC and other laws. It is the Courts' role to determine the constitutionality of any law passed by Parliament (arts 4(3) and (4)). The review by the courts on the constitutionality of legislation underscores the supremacy of the Constitution and not the supremacy of Parliament or the Judiciary. In the performance of this solemn duty the courts have the power to determine and declare on the validity of any enactment or statute. Any law found to be unconstitutional for being inconsistent with the FC is void and will be struck down. The task of determining the constitutionality of laws enacted by Parliament is a bounden duty which the courts must always uphold.

[108] This brings to mind the judicious and illuminating insights of HRH Sultan Azlan Shah in his paper entitled 'Supremacy of Law in Malaysia'. The paper was presented by HRH at the Tunku Abdul Rahman Lecture XI, Kuala Lumpur on 23 November 1984. The following passages are excerpts from the paper:

> Based on the doctrine of separation of powers, the legislature makes the law, the executive administers the law, and the judiciary adjudicates on disputes which may result from the first and second processes. Basic to this doctrine is the elaborate system of checks and balances whereby it is ensured that power is not concentrated

in any one body, but dispersed and mutually checked. Thus, for instance, *power reposed in the legislature is moderated by the power placed in the judiciary and vice versa*.

The Constitution of Malaysia grants the power of judicial review to our courts. The courts are enabled to control and correct laws passed by Parliament as well as actions undertaken by the executive *if such laws* and actions *violate the Federal Constitution. Article 4(1) is clear on this general power in relation to laws passed by Parliament. Where a law passed after Merdeka Day is inconsistent with any provision of the Constitution, that law is void to the extent of the inconsistency*.

The judiciary is singled out as the organ of government with this power of control. As Chief Justice Marshall of the United States Supreme Court once explained it, the power of judicial review flows from the province and function of the courts to interpret the law, and decide what it is on a given point. *Where an Act of Parliament is clearly repugnant to the Constitution, the choice is between upholding the Act or the Constitution. Under our Federal Constitution, the choice is made plain: the Act is void.*

...

The power of judicial review is not a feature which is invariably found in all countries professing a written constitution. Even where judicial review exists, one can detect differences in approach between countries. Occasionally, too, this power of judicial review is misunderstood and, where this is so, can only lead to a dislocation of the balance of moderating influences which is supposed to pervade the Constitution.

Even though the courts in Malaysia have the power to challenge laws passed by Parliament, they are not thereby positioning themselves in active competition with that representative body. The legislature, and in particular the Dewan Rakyat, embodies the majoritarian principle, as it should surely be in a democracy. The Dewan Rakyat represents the wishes of the people through their elected representatives, and ordinarily laws passed through proper procedure by a majority vote have to be accorded due recognition and validity.

Nevertheless, democracy means more than just simple majority rule, for even the majority has to abide by the dictates of the Constitution. There are some matters, notably fundamental rights, which are regarded as so paramount that they ought not be varied merely by the transient wishes of a majority in Parliament. This qualification on the majoritarian principle is indeed recognised by the amendment procedure prescribed under Article 159, under which in general a two-thirds majority of the total number of members of each House is required. *Courts, following from their function to declare what the law is, merely test the legality of an Act of Parliament when they exercise review power, and are thus reinforcing the supremacy of law and, ultimately, the democratic ideal. Upon this mantle of legality, difficult problems needing definitive judicial resolution will arise.*

...

Nevertheless, parliamentarians, politicians and judges are all expected to take their cue from the Constitution. They have to act in accordance with the Constitution and are subject to the limitations placed on their actions by law, since ours is a government of laws, not men.

[109] I am therefore driven to the conclusion that the NSCA 2016 is a security law equipped with emergency-like powers which transgress on all of the four fundamental rights specifically permitted under art 149. As such, the NSCA 2016 is an Act which belongs to the class of subject matter of legislation which comes within the ambit of art 149 of the FC. The abridgement of all the four arts 5, 9, 10 and 13 fundamental rights in the context of a security area and the attendant emergency-like sweeping powers must therefore be mandated under the authority of art 149. Sans the protective shield of art 149, the NSCA 2016 ranks as an ordinary law. Accordingly, it is inconsistent with the Constitution, in particular, arts 5, 9, 10 and 13 of the FC. In the result, the NSCA 2016 is an Act which is clearly repugnant to the Constitution. The choice is therefore between upholding the NSCA 2016 or the Constitution. Under our FC, the choice is made plain: the NSCA 2016 is void.

[110] In conclusion, I answer question (1) in the negative. That is to say, that the three constitutional Amendment Acts are not unconstitutional. The argument that the NSCA 2016 is unconstitutional because it became law pursuant to unconstitutional amendments is without merit. I would therefore answer Question (2)(i) in the negative. However, I answer question 2(ii) in the affirmative in that the NSCA 2016 is unconstitutional as it was not enacted under the authority of art 149. As such, the NSCA 2016 is void pursuant to art 4(1) for being repugnant to the FC. In the light of the foregoing, it is not necessary to answer question 2(iii). Accordingly, I would allow the appeal and make no order as to costs herein. Pursuant to sub-s 85(2) of the CJA 1964, I remit this matter to the High Court for disposal in accordance with the judgment of this Court and according to law.

[111] My learned brother Harmindar Singh Dhaliwal FCJ has indicated that he is in complete agreement with this written judgment.

Zaleha Yusof FCJ (delivering majority judgment of the court):

INTRODUCTION

[112] By consent and by order of the High Court dated 14 March 2019, this special case was referred to this court pursuant to s 84 of the Courts of Judicature Act 1964 ('the CJA') for the following constitutional questions to be determined by this court; so that the appellant's originating summons (OS) may be continued and disposed of by the High Court in accordance with the judgment of this court:

(1) whether s 12 of the Constitution (Amendment) Act (Act A566), s 2 of the Constitution (Amendment) Act 1984 (Act A584) and s 8 of the Constitution (Amendment) Act 1994 (Act A885) (cumulatively

referred to as 'the amending Acts') are unconstitutional, null and void and of no effect on the ground that they violate the basic structure of the Federal Constitution (FC); and

(2) whether the National Security Council Act 2016 (NSCA) is unconstitutional, null and void and of no effect on the following grounds:

(i) it became law pursuant to unconstitutional amendments;

(ii) it was not enacted in accordance with art 149 of the FC; and

(iii) it violates the freedom of movement guaranteed by art 9 cl (2) of the FC.

[113] Section 85 of the CJA provides that the Federal Court shall deal with and determine the special case in the same way as an appeal to the Federal Court. As far as the appellant's special case is concerned, this is the second time this special case is heard before this court. The original panel which heard the special case had, by a majority decision on 11 February 2020, declined to answer the constitutional questions as referred on the ground that they are abstract, academic and purely hypothetical. See: *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2020] 4 MLJ 133; [2020] 3 CLJ 593 ('DSAI No 1').

[114] However, on an application for a review made by the appellant pursuant to r 137 of the Rules of the Federal Court 1995, this court had on 10 September 2020 allowed the appellant's application and set aside the original panel's decision delivered on 11 February 2020. Hence, the rehearing of the special case before us.

[115] Before I proceed to discuss the constitutional questions, I must make certain observations. The review application by the appellant which was allowed by this court was based on the appellant's contention that there was a breach of natural justice as the appellant had no notice and was not accorded the opportunity to submit on the issue of whether the constitutional questions were abstract, academic and hypothetical before the decision was pronounced. The issue was never raised by the respondent in either its written or oral submissions; neither did the court put the issue to the parties at the hearing of the special case. This, according to the appellant, had resulted in a breach of natural justice which had also occasioned a grave injustice against him warranting a review intervention by this court. Except for my learned brother Vernon Ong FCJ, the rest of us in the present panel sat in that panel hearing the review. After hearing arguments, this court was persuaded that a case of breach of natural justice had been made out and that the appellant would be left without any remedy if the review was not allowed. This court found that this

particular issue of the constitutional questions being abstract, academic and hypothetical merited at least full and serious arguments with the benefit of submissions by both parties (see: *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2021] 2 MLRA 190 ('DSAI 2')).

[116] At the hearing of the review application, the appellant had also urged this court to allow the review application so as to give him the opportunity to argue on the academic issue at the rehearing of the special case. As stated above, this court had allowed the review application for that reason alone. In his written submissions filed on the rehearing of the special case before us, the appellant had put up his argument as to why the constitutional questions were not academic.

[117] Regrettably, at the rehearing of this special case, the issue, which was the very reason why the review was allowed at all by this court, was abandoned; as learned senior federal counsel acting for the respondents informed the court that she would not take up the issue and was ready to defend the amending Acts on the merit. With that concession, the hearing proceeded and the issue of whether the constitutional questions were abstract, academic and hypothetical, a most critical and valid issue which still troubles me, remains unaddressed at the rehearing of this special case. Surely this apex court must not be called upon to answer questions posed either in the affirmative or negative as required under sub-s 84(3) of the CJA where such questions are abstract, academic and hypothetical.

[118] The adversarial system, as practised in this country for the last sixty-four years does not mean that the courts, particularly the apex court, has become an answering post, 'a debating club nor an advisory bureau', obliged to answer any and all questions posed when there is no dispute or lis involved. See: *Bar Council Malaysia v Tun Dato' Seri Arifin bin Zakaria & Ors (Persatuan Peguam-Peguam Muslim Malaysia, intervener) and another appeal* [2020] 4 MLJ 773; [2018] 10 CLJ 129; *Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors* [2018] 3 MLJ 417; [2018] 4 CLJ 1 (FC); *Sun Life Assurance Company of Canada v Jervis* [1944] AC 111; *Ainsbury v Millington* [1987] 1 All ER 929; and *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476; [2012] SGCA 45. A concession by any or both parties cannot magically transform abstract, academic and hypothetical questions into questions which are no longer so; or worse which are not. More so when the concession relates to questions on the constitutionality and validity of the Federal Constitution.

[119] For good measure, I find that the questions posed are in fact abstract and hypothetical and for these reasons, academic and must not be entertained

under the special case route. While the appellant may have locus standi to pitch his grievance and approach the court for redress, he must nevertheless establish how he is affected for otherwise the courts will be answering questions *in vacuo* and rendering a decision which may cause injustice to future cases.

[120] The court has always shown its disapproval of such moves; the present special case is no exception — see: *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101; [1978] 1 LNS 44; *Tan Eng Hong v Attorney General* (Court of Appeal, Singapore); *Croome and another v State of Tasmania* (1997) 142 ALR 397 (High Court of Australia); *Leung TC William Roy v Secretary for Justice* [2006] HKCU 1585 (Court of Appeal, Hong Kong).

[121] The affidavit filed in support of the OS where declaratory orders on the constitutionality issue are so bereft of basis and facts such as to undermine and jeopardise any utility in the orders sought. This is not to forget that aside from claiming that the amending Acts are invalid by reason of the basic structure doctrine, the appellant has also claimed that the NSCA is inconsistent with art 149 of the Federal Constitution. However, the appellant has not given any reasons for saying so other than to say at para 7 of his affidavit that 'As to why this is so will be taken up by my counsel during argument'. His main thrust appears to be that 'the National Security Council Act 2016 is also unconstitutional and void as it was brought into effect pursuant to art 66(4) of the Federal Constitution as it now stands pursuant to the unconstitutional amendments made to that article'.

[122] This unfortunate state is amply borne out by the case as stated by the High Court pursuant to s 84 read with r 33 of the Rules of the Federal Court 1995:

(A) CONCISE FACTS

(1) The plaintiff filed the originating summons on 2 August 2016 seeking for the following orders:

(1) A declaration that section 12 of the Constitution (Amendment) Act 1983 (A566), section 2 of the Constitution (Amendment) Act 1984 (A584) and section 8 of the Constitution (Amendment) Act 1994 (A885) are unconstitutional, null and void and of no effect;

(2) A consequential declaration that Article 66(4) & (4A) as introduced by the Constitution (Amendment) Act (A885) is unconstitutional, null and void and of no effect;

(3) A declaration that the National Security Council Act 2016 is unconstitutional, null and void and of no effect;

(4) An injunction perpetually restraining the second defendants from taking or purporting to take any step or from acting or purporting to act pursuant to the National Security Council Act 2016;

(5) Such further and other declaration be granted consequent upon the relief claimed herein; and

(6) That there be no order as to costs.

(A copy of the Originating Summons No 24–97–08 of 2016 dated 2 August 2016 is attached herewith and marked as 'A')

(2) Subsequently, on 22 August 2016 the plaintiff filed encl 4, an ex parte application for an injunction pursuant to O 29 Rules of Courts 2012 and/or inherent jurisdiction of the court and/or O 92 r 4 of the Rules of Courts 2012 against the defendants seeking for the following reliefs:

(1) An interim injunction to restrain the Defendants whether on their own and/or by their agents and/or servants and/or employees and/or subordinates from taking any steps or conduct pursuant to the National Security Council Act 2016 until the disposal of this Originating Summons;

(2) An inter-partes hearing be fixed within 21 days of the herein Order; and

(3) No order as to costs.

(A copy of Enclosure 4 dated 22 August 2016 is attached herewith and marked as 'B')

(3) The defendants did not file affidavit in reply but raised a preliminary objection on two points namely, first, that the subject matter in this Originating Summons is within the jurisdiction of the Federal Court pursuant to art 4(3) and 4(4) of the Federal Constitution, therefore the High Court shall have no jurisdiction to hear. Secondly, the plaintiff has no locus standi to move the court for an order of an ex parte injunction against the defendants as the plaintiff is not an affected person by the subject matter being brought in this originating summons.

(4) On 14 October 2016, YA Datuk Hanipah Farikullah dismissed the originating summons with costs of RM3,000. There is no order made for encl 4.

(5) On 20 October 2016, the plaintiff appealed to the Court of Appeal vide Appeal No W-01(A)-416–10 of 2016. On 6 November 2017 the Court of Appeal dismissed the appeal. Thereafter the plaintiff filed a motion for a leave to appeal to the Federal Court vide the Federal Court Motion No 01(f)-10–03 of 2018(w) which was allowed on 20 March 2018.

(6) On 28 March 2018 the appeal to the Federal Court was filed. On 13 November 2018 before the Panel of the Federal Court, parties agreed to remit the originating summons to the High Court. Hence the Federal Court allowed the appeal and remitted the originating summons to the High Court for determination on merit.

(7) On 14 November 2018 the Honourable Chief Justice (sic) of Malaya instructed the originating summons to be heard by YA Dato Nordin bin Hassan in the High Court of RKK1. The case management was conducted on 21 November 2018

whereby directions have been given for parties to complete their cause papers and subsequently the hearing was fixed on 27 February 2019. A

(8) On 27 February 2019 Datuk Seri Gopal Sri Ram for the Plaintiff informed the High Court that parties agreed to refer constitutional questions to the Federal Court pursuant to s 84 of the Courts of Judicature Act 1964 (Act 91) and therefore provided a draft copy of the constitutional questions. The High Court adjourned the matter to 14-3-2019 for consideration. B

(9) On 14 March 2019 the High Court agreed to refer the constitutional questions to the Federal Court pursuant to s 84 of the Courts of Judicature Act 1964 (Act 91) with amendments to the draft constitutional questions.

(B) CONSTITUTIONAL QUESTIONS BEFORE THE FEDERAL COURT PURSUANT TO SECTION 84 OF THECOURTS OF JUDICATURE ACT 1964 (Act 91) C

10. The High Court respectfully states that in its opinion the following questions as to the effect of certain provisions of the Federal Constitution had arisen and which are necessary for the determination of the proceedings: D

(1) whether the following provisions of the written law are unconstitutional, null and void and of no effect:

(i) s 12 of the Constitution (Amendment) Act 1983 (Act A566); E

(ii) s 2 of the Constitution (Amendment) Act 1984 (Act A584); and

(iii) s 8 of the Constitution (Amendment) Act 1994 (Act A885)

on the ground that they violate the basic structure of the Federal Constitution. F

(2) whether the National Security Council Act 2016 (NSCA) is unconstitutional, null and void and of no effect on the following grounds:

(i) it became law pursuant to unconstitutional amendments;

(ii) it was not enacted in accordance with art 149 of the Federal Constitution; and G

(iii) it violates the freedom of movement guaranteed by art 9 cl (2) of the Federal Constitution.

(11) In accordance with s 84 of the Courts of Judicature Act 1964 the High Court transmits this special case to the Federal Court to determine the above questions. H

[123] Since the appellant has not explained how the NSCA is inconsistent with art 149 of the Federal Constitution, it is unclear how then question 2(iii) even arises. Save for the legal argument and reliance on the principle of basic structure of the Federal Constitution and para 1 of his affidavit where the appellant mentioned that 'the fact of my imprisonment does not deprive me of the right to bring the action'; a fact which was not in issue then, there is not a single allegation of any violation of any of his rights, be it under art 9 or any other article of the Federal Constitution. From the case stated and even in the I

cause papers, there are no facts save for the chronological events in relation to how the appellant's case had moved through the litigation process. The appellant's counsel is not in the position to make, neither can any counsel make such claims from the Bar.

[124] Section 84 of the CJA is special reference jurisdiction which should be exercised carefully and sparingly. Ordinarily and generally, the High Court itself should determine constitutional questions at first instance unless the matter falls within the original jurisdiction of the Federal Court. This is implicit from the use of the term 'special case' both under art 128 of the Federal Constitution and s 84 of the CJA. Nallini Pathmanathan FCJ in *DSAI No 1* had deliberated extensively on this aspect and we agree with the views expressed therein.

[125] The appellant's real complaint is that the NSCA is invalid because of the amending Acts and cll (4) and (4A) of art 66. If at all an allegation is allowed to be mounted under art 149, there must be factual context for the court to make a determinative finding. Without any context, the court will be leading down some slippery path, making abstract and hypothetical assumptions and conclusions; a wholly unsafe and untenable feat that this court must refuse to participate.

[126] These observations are fortified when I turn to the three principal reliefs in the OS — those reliefs are all for declaratory orders that the amending Acts are unconstitutional; that a consequential declaration that cll (4) and (4A) of art 66 which was introduced vide Constitution (Amendment) Act 1994 (A885) are unconstitutional, null and void and of no effect; that the NSCA is unconstitutional, null and void and of no effect.

[127] I will deliberate on this further when dealing with question 2(iii).

[128] On the strength of these observations, this court ought to decline answering any of the questions posed. But for these observations, and lest my position is misunderstood and worse, causes confusion, these are nevertheless my answers to the questions posed.

The special case

[129] The NSCA is assailed on three grounds. The first relates to the constitutionality of the amending Acts which consequently, according to the submission of learned counsel for the appellant, also affects the constitutionality of the existing provisions of cll (4) and (4A) of art 66 of the FC. It was the argument of learned counsel for the appellant that the amending Acts had taken away the requirement of the royal assent by the Yang di-Pertuan

Agong (YDPA), an Executive act, which according to his submission, forms part of the basic structure of the FC. Hence, art 66 as amended, violates the basic structure of the FC as the YDPA could now be taken to have given his assent; even though the assent had not been given. art 66, as amended, is therefore unconstitutional and consequently the NSCA which was enacted following its amended terms, that is, without actually receiving the royal assent is also unconstitutional (first issue).

[130] Secondly, it was argued by the appellant that the NSCA is a law relating to security, hence it must comply with cl (1) of art 149 of the FC. As it is not, it is therefore unconstitutional (second issue).

[131] The third ground launched by the appellant against the NSCA is that it is a disproportionate restriction on the liberty of the subject. It was contended that s 22 of the NSCA read with the other sections of the NSCA violates the freedom of movement guaranteed by art 9 cl (2) of the FC (third issue).

First issue

[132] I have had the privilege of reading the draft judgment of my learned brother Vernon Ong FCJ on this special case. His Lordship has exhaustively set out the submissions of the parties on the questions raised (see paras 8–26 of His Lordship's grounds of judgment) and I do not wish to repeat them here.

[133] The basic structure doctrine which is pivotal on this first issue has been the most talked about topic in many of this court's recent judgments such as *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750; [2021] 2 CLJ 579; and *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759; [2021] 5 CLJ 581. It has now again been raised in this special case and to tackle this issue, my learned brother Vernon Ong FCJ has gone at length in his grounds of judgment to reappraise the fundamentals of the FC, the institution of the YDPA and the legislative power of Parliament to make laws; which I have no hesitation to agree but to say that the YDPA is the Supreme Head of The Federation by virtue of art 32 of the FC. However, arts 39 and 40 of the FC provide that the YDPA shall act in accordance with the advice of the Cabinet or any Minister authorised by the Cabinet except for matters under the YDPA's discretion as stated in Clause (2) of art 40 of the FC. See also paras 57–58 of the Reid Commission Report 1957 which clearly states that the YDPA will be the Head of the Federation but he must be a constitutional Ruler and must therefore act on the advice of his Ministers with regard to all executive actions.

[134] Having said that I must nevertheless make it clear that the meaning, existence, role and significance of the basic structure doctrine in relation to our

beloved Federal Constitution have been comprehensively and exhaustively dealt with in the decisions referred to above; and I do not propose to repeat or restate the same save to say that the doctrine according to those cases, is not part of our jurisprudence.

[135] In any case, I would like to emphasise that the royal assent is never part of the executive act of the YDPA. It is part of the legislative process which has since been defined as 30 days. It is specifically housed under Chapter 5 of Part IV of the FC under the heading of 'Legislative Procedure'. This Chapter on Legislative Procedure explains the process and steps taken by the Legislature in enacting laws. Royal assent is the final step of the legislative process before a Bill becomes law. So it is part of a legislative act. The amending Acts do not at all serve to remove royal assent, as a Bill must still be presented to the YDPA under cl (4) of art 66 of the FC for the purpose of royal assent. The amending Acts only sought to clarify and define the procedure involving the YDPA in the law making process; to expedite the passing of laws, a process which is part and parcel of the responsibilities of any democratically elected Legislature.

[136] It is interesting to note that Trindade in his essay on 'The Constitutional Position of the Yang di-Pertuan Agong', in *The Constitution of Malaysia: Its Development 1957-1977* by Suffian, Lee and Trindade (Oxford University Press 1978) has said:

> For a Bill to become law it is necessary that it be passed by both Houses of Parliament and be assented to by the Yang di-Pertuan Agong. The Yang di-Pertuan Agong signifies his assent to a Bill by causing the Public Seal to be fixed to the Bill. An air of unreality surrounds the assent of the Yang di-Pertuan Agong because the *assent can never be withheld*. (Emphasis added.)

[137] In the same essay he again said that 'it does not seem possible for the YDPA to withhold assent to a Bill passed by both Houses of Parliament'.

[138] The issue of whether royal assent to a Bill can be withheld was also touched on by His Lordship Raja Azlan Shah in *The Role of Constitutional Rulers: A Malaysian Perspective for the Laity* (1982), Journal of Malaysian Comparative Law 1. His Lordship Raja Azlan Shah who was then the Lord President of the Federal Court, referred to the FC provisions concerning the royal assent and said:

> In Malaysia the role of the Rulers is specifically provided for in the Constitution and *the Rulers have no power to refuse*. It is most unfortunate, that the Regent of Pahang as reported in the Press recently, because of differences with the Menteri Besar, refused to signify his assent to a Bill passed by the State Legislative Assembly. *Such refusal is clearly unconstitutional*. (Emphasis added.)

[139] Having properly understood the significance of royal assent in the enactment of legislation, with all due respect to learned counsel for the appellant, I cannot agree that royal assent is an executive act of the YDPA which cannot be disturbed or dispensed with. It is therefore abundantly clear that even if for a moment this doctrine or principle of basic structure exists under our legal jurisprudence which authorities mentioned earlier have settled in the negative, the royal assent does not and is not a feature of that principle. Since the royal assent is not part of such doctrine, then the whole premise or basis for the first question must necessarily fail.

[140] Further, learned counsel for the appellant had referred to cl (1) of art 4 of the FC. That provision reads:

> 4(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

He argued that the word 'law' in cl (1) of art 4 of the FC includes such Acts of Parliament amending the FC under art 159. The amending Acts were made pursuant to cll (1) and (3) of art 159 of the FC. Hence, it is the contention of learned counsel for the appellant that as they are inconsistent with 'this Constitution' the amending Acts are unconstitutional and void pursuant to cl (1) of art 4 of the FC. Again, as correctly put by my learned brother Vernon Ong FCJ, I find this argument as devoid of merit. This court in *Maria Chin Abdullah*, in dismissing the contention that cl (1) of art 121 of the FC is manifestly inconsistent with cl (1) of art 4 of the FC referred to the position in *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70 as follows:

> [129] A distinction must be drawn between ordinary laws enacted in the ordinary way and Acts of Parliament that affect the Federal Constitution. It is federal law of the former category that is meant by 'law' in art 4(1): see *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793; [1993] 1 CLJ 264 at p 813 where the Supreme Court held:
>
> > It is true that the Constitution is the supreme law of the land. But 'law' in art 4(1), with reference to Acts of Parliament, means federal law consisting of ordinary law and not Acts affecting the Constitution. Only the former must be consistent with the Constitution. As Suffian LP said in *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70 at p 72:
> >
> > *In our judgement, in construing art 4(1) and art 159, the rule of harmonious construction requires us to give effect to both provisions and to hold and we accordingly hold that Acts made by Parliament, complying with the conditions set out in art 159, are valid even if inconsistent with the Constitution, and that a distinction shoud be drawn between on the one hand Acts effecting the Constitution and on the other hand ordinary laws enacted in the ordinary way. It is federal law of the latter category that is meant by law in art 4(1) ; only such law must be consistent with the Constitution.* (Emphasis added.)

[141] As stated by His Lordship Suffian LP in *Phang Chin Hock*, if it is correct that amendments made to the Constitution are valid only if consistent with its existing provisions, then clearly no change whatsoever may be made to the Constitution; in other words, art 159 is superfluous.

[142] Based on the above and other reasons as expounded by my learned brother Vernon Ong FCJ, my answer to the first issue is in the negative. Consequently the challenge on the constitutionality of the NSCA on the ground that it became law pursuant to unconstitutional amendments, also fails.

Second issue

[143] On the second issue, the constitutionality of the NSCA is challenged on the ground that it ought to have been enacted under art 149 of the FC. It is not challenged on the ground that the Parliament has no power to enact under art 74 of the FC read together with the Ninth Schedule. In fact, the appellant asserted in his OS that 'Kuasa Parlimen untuk menggubal undang-undang keselamatan adalah terhad kepada Fasal 149 Perlembagaan Persekutuan'. Hence, in this judgment, focus will be on art 149 itself and the NSCA.

[144] Lets start with the cardinal principle of the presumption of constitutionality. This principle is aptly explained by His Lordship Azahar Mohamed CJM, in the recent decision of this court in *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277 as follows:

> [83] ... learned deputy public prosecutor ('DPP') in responding to the arguments of the appellants, amongst others, raised an important point, which in my opinion the appellants had no convincing answer. Learned counsel overlooked the significance of this point. The point learned DPP wanted to make concerns the cardinal principle of the presumption of constitutionality. Citing the case of *Ooi Kean Thong & Anor v Public Prosecutor* [2006] 3 MLJ 389; [2026] 2 CLJ 701 and *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566 ('Pung Chen Choon'), he argued that there is a presumption — perhaps even a strong presumption — of the constitutional validity of the impugned sections and so the burden of proof lies on the party seeking to establish the contrary. Learned DPP also referred to *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128, where Hashim Yeop Sani J in expressing his views on the issue of constitutionality of an impugned legislation came close to the heart of the matter, I believe, when he said at p 131 'it must be presumed that the legislature understands and correctly appreciates the need of its own people and that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds provided however that while good faith and knowledge of the existing conditions on the part of the legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of

holding that there must be some undisclosed and unknown reasons for the discrimination'. A

[84] In this regard, the point was also discussed by MP Jain in *Indian Constitutional Law* at p 1641:

> The Courts generally lean towards the constitutionality of a statute upon the premise that a legislature appreciates and understands the needs of the people, that it knows what is good or bad for them, that the laws it enacts are directed to problems which are made manifest by experience, that the elected representatives in a legislature enact laws which they consider to be reasonable for the purposes for which these laws are enacted and that a legislature would not deliberately flout a constitutional safeguard or right. *The legislature composed as it is of the elected representatives of the people is supposed to know and be aware of the needs of the people and what is good or bad for them and that a court cannot sit in judgment over the wisdom of the Legislature*. Therefore, usually, the presumption is in favour of the constitutionality of the statute, and the onus to prove that it is unconstitutional lies upon the person who challenges it. (Emphasis added.) B C D

[85] On this point, there is an important observation made by Das CJ on behalf of the Supreme Court of India in *Shri Ram Krishna Dalmia & Ors v Shri Justice SR Tendolkar & Ors* AIR 1958 SC 538 that was cited with approval by our Federal Court in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257. Augustine Paul JCA quoting Das CJ held as follows at para 47: E

> SR Das CJ also listed some guidelines that must be borne in mind by the court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws. They are: F
>
> 1. A law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself. G
> 2. There is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. H
> 3. *It must be presumed that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds*.
> 4. *The legislature is free to recognize degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest.* I
> 5. In order to sustain the presumption of constitutionality, the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every

A state of facts which can be conceived existing at the time of legislation.

6. While good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

C [86] Of the above guidelines that must be borne in mind by the court when it is called upon to adjudge the constitutionality, it is no. 3 and no. 4 that is of critical importance to our present discussion. This is sometimes described as judicial deference that the Court should accord to the judgment of the democratically elected legislature on matters that is placed within the domain of the legislature. To be more precise, legislative decisions are entitled to an appropriate measure of deference and respect. It basically means courts attach proper weight to the views and policies adopted by Parliament ... (Emphasis added.)

E **[145]** What it means by this presumption of constitutionality is that the court must give recognition to the fact that the Legislature is better placed to assess the needs of the society and make decisions on how such needs are to be attended to as long as it works within the framework of the Constitution. Hence, the court should presume that statutes enacted by Parliament to be F constitutional unless it is clearly unconstitutional. Applying the presumption to the special case before us, the burden is on the appellant to show that the NSCA is unconstitutional.

G **[146]** The appellant's main argument in this second issue is that the NSCA is a statute relating to security. The only constitutional provisions under which security provisions may be enacted is under Part XI of the FC which contains art 149. Hence, according to the appellant, on a proper construction of Part XI and in particular cl 1 of art 149, it is mandatory for a security law, and for that matter, any law on security, to be enacted pursuant to or under cl (1) of art 149.

H **[147]** This argument is similar to the view taken by the minority in *DSAI No 1*. This can be deduced from the following paragraph of the judgment of His Lordship David Wong Dak Wah CJ (Sabah and Sarawak);

I [243] It is thus patently clear that the pith and substance of the NSCA 2016 by a very cursory but clear reading of its salient provisions indicate that it relates, at the very least, to the subject-matter of art 149(1)(f) of the Federal Constitution. The entire NSCA 2016 is full of references to national security and with measures addressed to curb any incursions into or threats to it. One hardly needs to read too deeply into the NSCA 2016's pith and substance to determine its true nature as

being a very severe law against the very subject of art 149 of the Federal Constitution, namely, special powers against subversion, organized violance and acts and crimes prejudicial to the public.

[148] It was the minority decision in *DSAI No 1*, that in pith and substance, the NSCA is a security law, hence ought to have been enacted in accordance with art 149 of the FC.

[149] With the greatest respect, I wish to differ from such a stand and I shall explain my reasons.

[150] As I had said at the start of the deliberations on this second issue, the appellant does not challenge the constitutionality of the NSCA on the ground that Parliament has no power to enact this law under art 74 of the FC read together with the Ninth Schedule. He accepts that Parliament has power to enact laws on, inter alia, security. That is correct.

[151] It is, however, his contention that laws on security may only be enacted under art 149 of the FC and no other provision of the FC.

[152] I must immediately dispel that misconception. art 74 is housed in Chapter 1 of Part VI of the FC. Chapter 1 concerns the distribution of legislative powers cl (1) of art 74 provides that 'Without prejudice to any power to make laws conferred on it by *any other* article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).

[153] Having examined the Ninth Schedule, it is clear that the subject matter of security, especially in the sense used in the NSCA (and this will become more apparent when we examine the NSCA in detail) falls within the terms of several items in List I of the Ninth Schedule including items 1, 2, 3, 4 and many more.

[154] In my view, Parliament may enact one piece of legislation that deals with more than one subject matter, drawing its powers from several listed items in the Ninth Schedule. In fact, Legislature frequently deals with a range of subject matters in the same legislation. For instance, the Road Transport Act 1987 (Act 333). This Act regulates motor-vehicles and traffic on roads through a licensing and registration mechanism, a power available under item 10 of List I of the Ninth Schedule. At the same time, Act 333 also contains provisions on insurance (item 8(d) of List I of the Ninth Schedule) whilst creating offences for certain violations and contraventions (item 4(h) of List I of the Ninth Schedule). Another example is the Prevention and Control of Infectious Diseases Act 1988 (Act 342). From the provisions of the Act, Parliament

enacted this law using both its powers under List I on health [item 14] as well as its concurrent powers under items 4 and 7 of List III of the Ninth Schedule. This means that as a starting point, Parliament may enact laws on security without resorting to art 149.

[155] Part XI of the FC where art 149 is housed, is one of the shortest parts in the FC; the shortest being Part XIV which deals with 'Saving for Rulers' Sovereignty'. Like Part V which deals with 'The States', Part XI has only three articles: arts 149, 150 and 151. Part XI deals with or provides for 'Special powers against subversion, organised violence, and acts and crimes prejudicial to the public and emergency powers'.

[156] The shoulder note of art 149 describes the article as providing for 'Legislation against subversion, action prejudicial to public order, etc'. We know that shoulder notes may be used to interpret or understand the intent of the relevant provision — see: *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1; *Chai Siew Yin v Leong Wee Shing* [2004] 1 CLJ 752; *Ganesan a/l Singaram v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1998] 1 MLJ 240; [1996] 1 AMR 126. In *Stephens v Cuckfield Rural District Council* [1960] 2 QB 373, Lord Upjohn opined that:

> While the marginal note to a section cannot control the language used in the section, it is at least permissible to approach a consideration of its general purpose and the mischief at which it is aimed with the note in mind.

[157] Articles 5, 9, 10 and 13 of the FC are provisions on fundamental liberties, the rights of which are guaranteed by our FC. However, art 149 of the FC gives special powers to Parliament to enact laws which are inconsistent or against those provisions or even against the legislative power of Parliament. In other words, Parliament is specifically authorised by the FC to enact laws which violate the fundamental liberties in art 5, 9, 10 and 13. The reason for this special power can be seen in the Report of the Federation of Malaya Constitution Commission 1957, at para 174 which reads:

> *To deal with any further attempt by any substantial body of persons to organised violence against persons or property, by a majority we recommend that Parliament should be authorised to enact provisions designed for that purpose notwithstanding that such provisions may involve infringements of fundamental rights or State rights. It must be for Parliament to determine whether the situation is such that special provisions are required* but Parliament should not be entitled to authorise infringements of such a character that they cannot properly be regarded as designed to deal with the particular situation. It would be open to any person aggrieved by the enactment of a particular infringement to maintain that it could not properly be so regarded and to submit the question for decision by the Court. *We see no need to recommend that the executive should have any emergency powers to act in such a situation before Parliament enacted legislation to deal with it: we think the emergency powers should not be used in this*

connection until the whole matter has been debated in Parliament ... (Emphasis added.)

[158] The validity of various laws enacted under art 149 of the FC has been decided in many cases. See for example the decision of the Federal Court in *Public Prosecutor v Lau Kee Hoo* [1983] 1 MLJ 157 and of the Supreme Court in *Ketua Polis Negara & Anor v Gan Bee Huat and other appeals* [1998] 3 MLJ 86. For ease of reference, the provision of art 149 of the FC is reproduced as follows:

149 Legislation against subversion, action prejudicial to public order, etc.

(1) If an Act of Parliament recites that *action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation —*

(a) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property; or

(b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or

(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or

(d) to procure the alteration, otherwise than by lawful means, of anything by law established, or

(e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or

(f) *which is prejudicial to public order in, or the security of, the Federation or any part thereof*,

any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

(2) A law containing such a recital as is mentioned in Clause (1) shall, if not sooner repealed, cease to have effect if resolutions are passed by both Houses of Parliament annulling such law, but without prejudice to anything previously done by virtue thereof or to the power of Parliament to make a new law under this Article. (Emphasis added.)

[159] To date, six Acts of Parliament have been enacted pursuant to art 149. They are:

(a) Internal Security Act 1960 (Act 82) which has now been repealed;

(b) Dangerous Drugs (Special Preventive Measures) Act 1985 (Act 316);

(c) Dangerous Drugs (Forfeiture of Property) Act 1988 (Act 340);

(d) Security Offences (Special Measures) Act 2012 (Act 747);

(e) Prevention of Terrorism Act 2015 (Act 769); and

(f) Prevention of Crime Act 1959 (Act 297).

[160] What is pertinent in art 149 is that the laws that are enacted thereunder must contain a recital stating that 'action has been taken or threatened by any substantial body of persons' to cause the acts described in the paragraphs of the said article. Hence, all the above-mentioned six Acts of Parliament have in their respective preambles as follows:

> Whereas action has been taken and further action is threatened by a substantial body of persons both inside or outside Malaysia.

[161] On this, it is very relevant for me to cite the decision of this court by Vernon Ong FCJ in *Selva Vinayagam a/l Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] 1 MLJ 601. The case involves a detention under Act 316, one of the six Acts mentioned above. The relevant portion of His Lordship's judgment reads:

> [36] A careful scrutiny of the long title and preamble to Act 316 will lead to two observations. First, the long title had adopted the wordings of cl (1) of Article 149 to the effect that 'action has been taken, and is being threatened by any substantial body of persons ...'.
>
> ...
>
> [44] What is meant by the phrase 'a substantial body of persons'? The word 'substantial' has been defined by the *Oxford Advanced Learner's Dictionary* (5th Edition) as 'large in amount or value; considerable'; 'considerable' is defined as 'great in number or size'. 'Body' is defined as 'a group of people working or acting as a unit (see *Oxford Advanced Learner's Dictionary* (5th Ed) or as '[a] number of individuals spoken of collectively, usually associated for a common purpose, joined in a certain cause or united by some common tie' (see *Words, Phrases & Maxim — Legally & Judicially Defined* Vol 2 (Anandan Krishnan, LexisNexis 2008). The word 'person' refers to a human being as an individual or a human being, especially not identified (see *Oxford Advanced Learner's Dictionary* (5th Ed). In the light of the foregoing, we think that the phrase 'a substantial body of persons' refer to a large number of individuals acting in concert or working together for a common purpose. In the context of Act 316, we think that it refers to action which is prejudicial to public order which has been taken or is being threatened by a large number of individuals acting together in the trafficking in dangerous drugs.

[162] This court had in *Selva Vinayagam*, unanimously set aside the detention order for being ultra vires art 149 of the FC as this court, inter alia, held that the grounds of detention revealed that the detenue had acted alone and not in association with a substantial body of persons.

[163] As alluded to in para 46 of this judgment, the purpose of art 149 is to deal with 'any further attempt by *any substantial body of persons* to organised violence against persons or property' and this is reflected in the clear terms of art 149 itself, that laws enacted under art 149 are specifically to 'stop or prevent that action'; 'that action' being '*action has been taken or threatened to be taken by any substantial body of persons, whether inside or outside the Federation*'. What is important to bear in mind is that it is not simply any action taken or threatened to be taken. It has to be 'action' as described in paras (a)–(f) of cl (1) of art 149. Now the effect of the decision of this court in the case of *Selva Vinayagam*, is to reinforce that purpose of art 149 of the FC, that it is not only to stop, suppress or prevent subversion of any of the kinds described therein; but such act of subversions must be committed by persons, not only one person or individual but by a large or substantial number of persons or individuals acting together. This is the condition precedent which Parliament needs to fulfil in enacting any Act under this provision of art 149. The Legislature must ensure that the purpose of an Act enacted under this art 149 must be to prevent the subversive activities committed by a large number of persons.

[164] Related to this is the question of who is to determine whether any of the situations or circumstances as described in paras (a)–(f) of cl (1) of art 149 has arisen? In my view, it can only be properly ascribed to the Legislature as held by this court in *Danaharta Urus Sdn Bhd*. The courts cannot assume this role, that will be a violation of the doctrine of the separation of powers; neither can we look into the provisions of any Act passed and find that Parliament ought to have used its special powers under art 149 instead of its general powers under art 74.

[165] The trigger event in the clear terms of art 149 is necessarily subjective and factual; a circumstance that the court is in no position to assume or conclude. More so when no affidavits in reply were filed by the respondents; or any facts placed before the court by the appellant. The facts in the case stated by the High Court are merely narrative of the chronological development of the appellant's case in court.

[166] I am fortified in my view when once again, I turn to the caution in the Report of the Federation of Malaya Constitution Commission 1957 where it is stated that it is for Parliament to 'determine whether the situation is such that special provisions are required'. Since cl (1) of art 149 provides for six circumstances or situations of (a) to (f) where this special power may be invoked, it is for Parliament to recite which event has actually triggered the invocation or resort to art 149. That trigger event is then manifested as a recital in the special legislation passed. Where the special legislation contains such a recital, then in the event any of its provisions are inconsistent with the provisions of art 5, 9, 10 or 13, such provisions remain valid.

[167] Next, lets examine the NSCA. Its preamble says it is 'An Act to provide for the establishment of the National Security Council, the declaration of security areas, the special powers of the Security Forces in the security areas and other related matters.'

[168] 'National Security' is not defined under the NSCA. However, the functions of the National Security Council are set out in s 4 which states:

> 4 Functions of the Council
>
> The Council shall have the following functions:
>
> (a) to formulate policies and strategic measures on national security, including sovereignty, territorial integrity, defence, socio-political stability, economic stability, strategic resources, national unity and other interests relating to national security;
>
> (b) to monitor the implementation of the policies and strategic measures on national security;
>
> (c) to advise on the declaration of security areas; and
>
> (d) to perform any other functions relating to national security for the proper implementation of this Act.

[169] During the tabling of the NSCA Bill at the Dewan Rakyat on 3 December 2015, the Minister had stated the following on the threat to the national security:

> Jika dahulu negara berhadapan dengan ancaman penjajahan oleh kuasa asing, keganasan komunis, pemisahan wilayah, insiden 13 Mei 1969 dan sebagainya. *Mutakhir ini kita berhadapan pula dengan gelombang ancaman keselamatan negara yang bersifat multidimensi dari dalam dan luar negara seperti kerapuhan perpaduan nasional, cabaran terhadap sistem demokrasi negara, serangan terhadap sistem ekonomi, ancaman siber, ancaman keselamatan maritim, ancaman keganasan, ancaman jenayah rentas sempadan dan lain-lain lagi.*
>
> *Bentuk-bentuk ancaman yang kompleks dan dinamik* ini memerlukan negara memperkukuhkan mekanisme dan sistem dalam penggubalan dasar-dasar keselamatan, perkongsian makluman perisikan dan tindak balas segara yang bersepadu oleh pasukan keselamatan ke atas sesuatu insiden ancaman keselamatan yang diluar kemampuan sesebuah agensi. Ini kerana insiden keselamatan negara boleh berlaku pada bila-bila masa tanpa dapat dijangka seperti insiden keganasan yang berlaku di Perancis baru-baru ini. (Emphasis added.)

[170] Quite clearly, there was no mention or indication that the NSCA Bill was enacted to deal with subversion, organised violence, acts and crimes prejudicial to the public as intended under Part XI and specifically under art 149 of the FC.

[171] When tabling the NSCA Bill at the Dewan Negara on 21 December 2015, the Minister explained the reason why the word 'national security' was not described or defined in the Bill. The following are the relevant excerpts of the Minister's speech at the Dewan Negara:

> *Takrif 'keselamatan negara', tidak diperuntukkan dalam rang undang-undang ini kerana bentuk ancaman keselamatan negara adalah dinamik dan berubah-ubah mengikut situasi semasa.* Ini adalah selaras dengan norma dan amalan antarabangsa kerana kebanyakan negara turut tidak mentakrifkan 'keselamatan negara' dalam undang-undang keselamatan mereka.
>
> *Walaupun tidak ada takrifan khusus diperuntukkan mengenai 'keselamatan negara' dalam rang undang-undang ini, 'keselamatan negara' dalam konteks Malaysia adalah seperti yang diperuntukkan dalam fasal 4(a) iaitu termasuklah kedaulatan, integriti wilayah, kestabilan sosial politik, kestabilan ekonomi, sumber strategik dan apa-apa kepentingan yang berkaitan dengan keselamatan negara*'. (Emphasis added.)

[172] So, it seems the definition of 'national security' was purposely left out, in accordance with international norms and practices as the form of national threats is dynamic and changes according to prevailing circumstances. Although it was not defined, the scope of the national security is non-exhaustive as it includes sovereignty, territorial integrity, defence, socio-political stability, economic stability, strategic resources, national unity and other interests relating to national security.

[173] An example of a country with the establishment of a National Security Council under its National Security Act is the United States of America. Just like Malaysia, the United States of America's Act also does not define what is national security. India and United Kingdom have their own respective National Security Council which are administratively set up with no legislation governing its establishment.

[174] In fact, historically, the National Security Council has long been in existence in Malaysia even before the enactment of the NSCA in 2016. It started off with the establishment of the National Operations Council or Majlis Gerakan Negara (MAGERAN) following the 13 May 1969 racial riots incident with the purpose of improving public safety, national defence and peace preservation for the general public.

[175] MAGERAN was dissolved in 1971 and in its place, the National Security Council was established on 23 February 1971. It was to coordinate policies related to the nation's safety and public peace. It was renamed as the National Security Division under the Prime Minister's Department in 1995. However it was re-organised and renamed the National Security Council again on 24 July 2007. The National Security Council was thus established administratively before the enactment of the NSCA.

[176] Based on its historical background, the issue as to whether the NSCA is a subversive law that needs to be enacted under art 149 of the FC must be given a very careful consideration. The mere fact that the word 'security' is used and the mere fact the inclusion of special power to deploy personnel in a security area, do not in my view make the NSCA a law against subversion as envisaged by art 149 of the FC. The word 'security' itself has a very wide meaning. For example, *Meriam-Webster Dictionary* defines 'security', inter alia, as the quality or state of being secure: such as freedom from danger, freedom from fear or anxiety, freedom from the prospect of being laid off ie job security.

[177] When a statute is not very clear, it is the court's duty to find what is the intention of the Legislature or Parliament in enacting it. In *Seaford Court Estates Ltd v Asher* [1949] 2 KB 481, Denning LJ said the following:

> Whenever a statute comes up for consideration, it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even it were, it is not possible to provide for them in terms free from ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftman. He must set to work in the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature.

[178] So in our context, it is the duty of this court to find out what was the intention of Parliament in enacting the NSCA and not by looking merely at the words used in the said Act. Reference is also made to s 17A of the Interpretation Acts 1948 and 1967 which reads as follows:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act *(whether that purpose or object is expressly stated in the Act or not)* shall be preferred to a construction that would not promote that purpose or object. (Emphasis added.)

[179] As alluded to earlier, the NSCA does not define 'national security' which according to the speech of the Minister was purposely done. However, s 4 of the NSCA describes the function of the National Security Council, inter alia, to formulate policies and strategic measures *on national security including sovereignty, territorial integrity, defence, socio-political stability, economic stability, strategic resources, national unity and other interests relating to national security*.

[180] I have stated in the foregoing paragraphs, the National Security Council has been in existence even before the NSCA was enacted. It has formulated policies and strategic measures on national security and has thus far issued 24 Directives, amongst which, Directive No 20 has always been cited and used. Directive No 20 was issued on 11 May 1997 and revised in 2012. Directive No 20 deals with Policy and Mechanism of National Disaster Management and Relief, acting as a framework relating to disaster relief management in our country. It determines the roles and responsibilities of government agencies, statutory bodies, voluntary bodies and private sector in managing disasters, reducing casualties and minimising damage of assets. It outlines the roles and functions of various committees. In essence, its aim is to coordinate relief and rehabilitation of victims and returning them to normalcy.

[181] Directive No 20 cites the many mishaps and disasters which had occurred and which had prompted the issuance of the said Directive, inter alia, an explosion and fire that ruined a fireworks factory belonging to Bright Sparklers Sdn Bhd at Sungai Buloh Selangor on 7 May 1991, causing 22 deaths and 103 others injured; the collapse of the Highland Towers Condominium in Hulu Kelang, Selangor on 11 December 1993 where 48 people were killed; the sudden mud flood that destroyed an Aborigines Settlement Village at Dipang Post, Kampung Sahom, Mukim Kampar, Perak on 29 August 1996 claiming 44 lives and destroying 30 houses; and Tropical Storm 'Greg' which hit the West Coast of Sabah on 26 December 1996 killing more than 230 people and destroying more than 4,925 houses.

[182] At paras 5–6 of Directive No 20, the definitions of disaster and what amounts to disastrous incidents are explained. I reproduce those paragraphs as follows:

> DEFINITION OF DISASTER
>
> 5. For the purpose of this directive, Disaster is defined as an incident which occurs in a sudden manner and complex in its nature and that causes losses (sic) of lives, damages (sic) to property or natural environment and bring (sic) a deep effect to local activities. Such incident needs a management that involving (sic) extensive, resources, equipment, skills and manpower from many agencies with an effective coordination, which is possibly (sic) demanding a complex action and would take a long time.
>
> DISASTROUS INCIDENTS
>
> 6. The disastrous incidents covered by this directive is as below:
>
> 1. Natural disaster such as flood, storm, drought, shore erosion, landslide or any other disaster because of strong wind and heavy rain.
>
> 2. Industrial tragedy such as explosion, fire, pollution and leaking of hazardous materials from factories refineries and industrial depots which process, produce and stores (sic) such materials.

3. Accident (sic) that involved the transportation, supply and removal of hazardous materials.

4. The collapse of high rise building and special structures.

5. Air crashed (sic) occur at a place with building and men.

6. Train collision and derailment.

7. A fire which involves a huge area or high rise building or any special structure with many people inside.

8. The burst of hydroelectrical power station or a reservoir.

9. Nuclear and radiology accident involving nuclear composites or radioactive agents in which the accident could spread out and (sic) causing the lost of live (sic), property damage or the (sic) environment pollution and affecting the (sic) local activities.

10. The release of toxic gas at the public area, and

11. Haze which can cause a critical situation to the environment, threatening public harmony, government administration and economic activities of the state.

[183] The National Security Council has also formulated the National Security Policy which in its para 4 entitled 'National Security Environment', amongst other matters that are given attention to ensure national security and survival of Malaysia as a sovereign state are matters pertaining to disasters, pandemics and infectious diseases and food security.

[184] The reference to directives and policy as set out above are significant in order to show the purpose and intention of Parliament in enacting the NSCA. Not only s 4 of the NSCA is relevant for this purpose, ss 43 and 44 are more telling. The sections read as follows:

43 Existing National Security Council

(1) Any act done or action taken *prior* to the commencement of this Act by the existing National Security Council established by the Federal Government shall be *deemed to have been done or taken under this Act* and may accordingly *be continued* by the Council.

(2) *Any directive*, order or decision made by the existing National Security Council and in force immediately before the commencement of this Act shall, upon the commencement of this Act, so far as it is not inconsistent with this Act *continue to remain in force* until it is revoked by the Council.

44 Existing committees

All committees established under the existing National Security Council and in force immediately before the commencement of this Act, shall, upon the commencement of this Act, *continue to remain in force* until dissolved by the Council. (Emphasis added)

[185] Sections 43 and 44 of the NSCA provide that whatever directives or action issued or taken by the National Security Council before the commencement of the NSCA continue to remain in force. These sections are savings provisions which cannot be disregarded. When reading an Act, one cannot pick and choose to read only the main body without looking at its tail which would help to shed light on the true direction, purpose and intent of the Act. In the special case before us, ss 43–44 of the NSCA reveal the existence of various directives, policy and committees which are already in place and will continue to be in force. Hence, the directive such as Directive No 20 and the National Security Policy drawn remain and forms part of the policy and strategic measures as if formulated under s 4 of the NSCA. As can be seen from the contents of Directive No 20 and the formulated National Security Policy, they do not, in my humble view, indicate that the NSCA is meant to be the law against subversion. Clearly, it is meant to include protection and safety of people against situations of disasters like flood, earthquakes and other situations like the current Covid-19 pandemic. The court cannot turn a blind eye but instead must take judicial notice of the magnitude and effect of the Covid-19 pandemic, all of which remains real and affects the security of this Nation. Surely, it cannot be suggested for a single moment that Covid-19 is due to the actions or threatened actions of subversion, organised violence, act and crime prejudicial to the public caused by a substantial body of persons, whether inside or outside the Federation. There is no evidence coming anywhere near close to the trigger in art 149 and the courts must not engage in speculation.

[186] One may find similarities in certain provisions of the NSCA and the six Acts mentioned in para [159] above, especially Act 82. Those similarities alone will not make the NSCA falls under art 149. There are other matters that must be taken into consideration. At the risk of repetition, there is the trigger point under art 149 which needs to be satisfied. Further, as explained, there are certain provisions in the NSCA distinct from those of the six Acts, particularly s 4 read together with ss 43 and 44 which when being carefully examined, reveal the real purpose and intent of the NSCA. One therefore cannot compare certain provisions, without reading the Act as a whole.

[187] Hence, it is my considered view that the NSCA can never be meant to be enacted under art 149 of the FC. Not only because the Minister had said so in his speech in the Parliament, but also because art 149 of the FC, as alluded to earlier, is meant to curb the prescribed activities which have been taken or is being threatened by a *substantial body of persons*. These words 'a substantial body of persons' cannot be disregarded, as there is a presumption that every word in a law is to be given meaning, as the drafter does nothing in vain and the court must endeavour to give significance to every word used (see: *Bennion on Statutory Interpretation* (7th Ed 2017, section 21.2) and the decision of this court in *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan,*

deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased) [2020] 4 MLJ 721 at p 737; [2020] 7 CLJ 561; [2020] 4 MLRA 394 at pp 410–411). Hence, those words 'substantial body of persons' in art 149 must also be given importance. art 149 of the FC directs attention and focus on activities of persons. That is its restriction. Whereas the NSCA is much wider than that as it is also meant to cover other matters such as disasters and infectious diseases which definitely and undeniably affect national security.

[188] Based on the above, my answer to the second issue is in the negative.

Third issue

[189] I must reiterate the critical observations made earlier about this third issue: that this does not arise from the OS filed, and there is no crucial factual basis upon which to evaluate the allegation. This apex court should not be answering constitutional questions and challenges on the constitutionality of any law *in vacuo* and where injustice may also result. The reality of this opinion will be borne out in my deliberations on this issue.

[190] Essentially the appellant's contention on this issue is, the NSCA is unconstitutional as it violates freedom of movement guaranteed by cl (2) of art 9 of the FC. The appellant's contention is, the NSCA particularly s 22, read together with other provisions of the said Act especially s 18 is unjustified and offends the principle of proportionality.

[191] Article 9 of the FC provides as follows:

> 9(1) No citizen shall be banished or excluded from the Federation.
>
> (2) Subject to Clause (3) and to any law relating to the security of the Federation or any part thereof, public order, public health, or the punishment of offenders, every citizen has the right to move freely throughout the Federation and to reside in any part thereof.
>
> (3) So long as under this Constitution any other State is in a special position as compared with the States of Malaya, Parliament may by law impose restrictions, as between that State and other States, on the rights conferred by Clause (2) in respect of movement and residence.

[192] The freedom of movement under art 9 of the FC is not absolute. This was observed in *Assa Singh v Mentri Besar, Johore* [1969] 2 MLJ 30. The Federal Court stated at p 47:

> ... *The rights protected by Article 9 clause (2) are not absolute rights.* They may be subordinated to the larger social interests. As Holmes J used to say: 'In a complicated society there are no absolutes'. E*ach of these rights is liable to be curtailed by laws made or to be made by Parliament to the extent mentioned in clause (2) read*

with clause (3), that is, in the interests of the security of the Federation, public order, public health, or the punishment of offenders, restricting freedom of movement or residence between a State and other States. If these rights are absolute rights then Parliament would be completely debarred from making any law taking away or abridging any of those rights. The net result is that the unlimited legislative power of Parliament given by Article 74 is cut down by the provisions of Article 9 clause (2) and clause (3) and all laws made by Parliament with respect to these rights must, in order to be valid, observe these limitations. *Whether any law has in fact transgressed these limits is to be ascertained by the court.* (Emphasis added.)

[193] It further explained:

The true view, in my opinion, is that Article 9 clause (2) does not refer to the freedom of movement or residence simpliciter but guarantees the right to move freely 'throughout the Federation' and the right to reside in any part thereof. Clause (2) read with clause (3) authorise the imposition of 'restrictions' on these rights in the interests of security, public order, public health or the punishment of offenders. Reading the provisions of Article 9 together, it is reasonably clear that it was designed primarily to emphasise the factual unity of the Federation and to secure the right of a free citizen to move from one place in the Federation to another and to reside in any part thereof. In short, the object of article 9, not unlike article 13(1) of the Declaration of Human Rights, is to remove all internal barriers in the country and to make it as a whole the dwelling place of all citizens. It has nothing to do with the freedom of the person as such. That is guaranteed to any person, citizen or non-citizen (except enemy alien) in the manner and to the extent formulated by article 5. (Emphasis added.)

[194] As explained, the freedom of movement in art 9 is not freedom of movement or residence *simpliciter*. The guarantee in art 9 is the right to move freely 'throughout the Federation'; a right which the appellant did not enjoy at the material time of his application due to his incarceration as admitted by him in his affidavit. The appellant has not explained how his freedom of movement has been affected under the NSCA and his right under art 9 contravened. In any case, cl (2) of art 9 allows the freedom of movement to be restricted on four grounds namely in the interest of security, public order, public health or the punishment of offenders.

[195] Learned counsel for the appellant had no quarrel with that freedom of movement may be restricted on those grounds. However he argued that the law must first meet the test of proportionality and must be in compliance with cl (1) of art 4 of the FC. Learned counsel adopted the judgment of David Wong Dak Wah, CJSS in *DSAI No 1*. In *DSAI No 1* His Lordship CJSS had stated:

[276] it is quite clear that s 22 is an incursion on the freedom of movement guaranteed in art 9(2). The question which arises is whether it is a proportionate incursion?

[277] Section 22 must be read with s 18(1) as it relates to the sole discretion conferred to the Prime Minister to declare an area as a 'security area'. The powers

available to the Director of Operations under s 22 are contingent upon the Prime Minister declaring and designating a given area as a 'security area'.

[278] The first notable feature of s 22 read with s 18 is that there is no indication in the whole of the NSCA 2016 on what exactly comprises a 'security area', how large such an area may be declared, and for how long such declaration may persist. It was earlier observed that the declaration of a 'security area' and the general power conferred on the security forces and the second respondent are so wide and invasive that there no longer seems to be any distinction between such a declaration and a proclamation of emergency. In short, the NSCA 2016 practically empowers the Prime Minister to bypass the YDPA to proclaim for himself a state of emergency.

[279] Once a security area is declared, s 22 not only empowers the Director of Operations to restrict or exclude someone from the 'security area', but it also empowers him to re-settle such person or persons to some other area he deems fit. The NSCA 2016 provides no criteria whatsoever on where exactly such persons may be re-settled and for how long. So, assuming therefore that the Prime Minister decides to declare an entire State as a 'security area', the Director of Operations has the theoretical and absurd power to evacuate and re-settle any number of persons from that State arguably even to some other State. Surely, nothing in the NSCA 2016 leads to me to a more palatable or re-assuring conclusion.

[196] His Lordship further said:

[284] Assessing s 22 of the NSCA 2016 as a whole, and coupled by the fact that it is very reminisce of powers unique to a state of emergency, one can hardly appreciate s 22 as being necessary or proportionate to any aim targeted to preserve 'public order' much less, can it be considered the least intrusive or less restrictive measure. The powers are so comprehensive that they border on being callous. I cannot therefore bring myself to agree with the respondents that there is at all any fair and objective balance in favour of the interests of the State as compared to the interests of the public.

[285] Further, s 22 of the NSCA 2016 is so inextricably linked to s 18 of the NSCA that it is hardly possible to sever the two. The nub of the entire Act actually stems from s 18 by the power conferred on the Prime Minister to declare a 'security area'. These powers are very pervasive and know no bounds or limits. Section 18 itself is, for the same reasons adumbrated disproportionate to art 9(2) of the Federal Constitution. I also analysed many of the other key provisions in issue (c) above what other powers are conferred on the security forces once a 'security area' is declared. Thus, because art 18 is essentially an anchor provision, having declared that it is unconstitutional not only renders s 22 unconstitutional as well, but all the other provisions which flow from s 18 (as mentioned earlier).

[286] With ss 18 and 22 of the NSCA 2016 being unconstitutional, the rest of the NSCA 2016 merely become redundant and the Act a hallow shell. It therefore leads to one conclusion that the entire NSCA 2016 is indeed unconstitutional by virtue of the entire regime and structure of it being disproportionate to art 9(2) of the Federal Constitution. In the result, I am constrained to answer the constitutional question in issue (d) in the affirmative, that is: whether the NSCA 2016 is a disproportionate intrusion on the right to freedom of movement guaranteed by art

9(2) of the Federal Constitution, and thereby unconstitutional. A

[197] David Wong Dak Wah, CJSS was of the view that ss 18 and 22 of the NSCA were unconstitutional as the powers conferred are very pervasive and not proportionate to any aim to preserve 'public order'. B

[198] For easy reference, ss 18 and 22 are reproduced below:

18(1) Where the Council advises the Prime Minister that the security in any area in Malaysia is seriously disturbed or threatened by any person, matter or thing which causes or is likely to cause serious harm to the people, or serious harm to the territories, economy, national key infrastructure of Malaysia or any other interest of Malaysia, and requires immediate national response, the Prime Minister may, if he considers it to be necessary in the interest of national security, declare in writing the area as a security area. C

(2) A declaration made under subsection (1) shall — D

(a) apply only to such security area as specified in the declaration; and

(b) cease to have effect upon the expiration of the period specified in subsection (3) or upon the expiration of the period of renewal specified in subsection (4), or in accordance with subsection (6). E

(3) A declaration made under subsection (1) shall, but without prejudice to anything previously done by virtue of the declaration, cease to have effect upon the expiration of six months from the date it comes into force.

(4) Notwithstanding subsection (3), a declaration in force may be renewed by the Prime Minister from time time for such period, not exceeding six months at a time, as may be specified in the declaration. F

(5) A declaration made under subsection (1) and a renewal of declaration made under subsection (4) shall be published in such manner as the Prime Minister thinks necessary for bringing it to the notice of the public.

(6) A declaration made under subsection (1) and the renewal of declaration made under subsection (4) shall be published in the *Gazette* and laid before Parliament as soon as possible after it has been made, and if resolutions are passed by both Houses of Parliament annulling the declaration, it shall cease to have effect, notwithstanding subsection (3) and (4), but without prejudice to anything previously done by virtue of the declaration. G H

(7) Notwithstanding anything in subsection (2), (3), (4) or (6), the Prime Minister may, at any time, revoke the declaration.

...

22(1) The Director of Operations, may, by order in writing, exclude any person from the security area or any part of the security area for a period as specified in the order. I

(2) The Director of Operations may, by order in writing, evacuate any person or group of persons from the security area or any part of the security area, and resettle such persons or group of persons to an area as determined by the Director of Operations.

(3) Any person who fails to comply with the order under subsection (1) or (2) commits an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both.

[199] Section 18 empowers the Prime Minister to declare an area as a security area while s 22 is on exclusion and evacuation of persons from the security area by order of the Director of Operations.

[200] When a fundamental right is alleged to have been infringed, the concept of proportionality is used as a test to determine whether the action of the State, Executive or Legislature which purportedly infringes the fundamental right is arbitrary or excessive. The infringement is said to be proportionate when it has an objective that is sufficiently important to justify limiting the right in question; the measures designed by the relevant state action to meet its objective must have a rational nexus with that objective and the means used by the relevant state action to infringe the right asserted must be proportionate to the object it seeks to achieve (see *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1; [2019] 5 CLJ 780, *Maria Chin Abdullah,* and *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 507).

[201] This court in *Alma Nudo*, had, inter alia, held:

> [120] ... Proportionality is an essential requirement of any legitimate limitation of an entrenched right. Proportionality calls for the balancing of different interests. In the balancing process, the relevant considerations include the nature of the right, the purpose for which the right is limited, the extent and efficacy of the limitation, and whether the desired end could reasonably be achieved through other means less damaging to the right in question ...

[202] Hence, proportionality calls for the balancing of interests of the State or community at large and the protection of fundamental rights.

[203] As explained earlier on, the NSCA in my view, is not a law against subversion but is law relating to national security which also encompasses ,inter alia, economic and environmental stability and public health. Laws against subversion and of the nature and character intended under art 149 are quite evident in the six laws that I had adverted to earlier. The NSCA is far from being such legislation. Even in the matter of declaring an area as a security area, the presence of such provisions does not *ipso facto* render the NSCA invalid and unconstitutional. As submitted by learned senior federal counsel for the

respondents, the circumstances in which an area is declared a security area are stringent, that it is only where the threat is grave and has potential to cause serious harm; where it would be imperative and necessary to exclude or evacuate persons from a security area. This is as provided in s 18 itself, that it is only where the security in any area in Malaysia 'is seriously disturbed or threatened by any person, matter or thing which causes or is likely to cause serious harm to the people, to the territories, economy, national key infrastructure of Malaysia or any other interest of Malaysia' and immediate national response to this disturbance or threat is required. Hence, the gravity of the threat and the urgency of response are key or paramount elements to any valid exercise and recourse to s 18. Section 18 implicitly recognises the doctrine of proportionality and has prescribed conditions before its aid may be resorted to. The availability of access to court and to the protection of the law is further undisturbed; quite unlike the position under the six laws enacted under art 149.

[204] Similar provisions may be found in s 11 of the Prevention and Control of Infectious Diseases Act 1988 (Act 342) and s 36 of the Animals Act 1953 (Revised 2006) (Act 647).

[205] There are clear and very real illustrations of the application of such provisions. For example, during the current pandemic or spread of infectious disease such as Covid-19 where certain areas are put under Enhanced Movement Control Orders (EMCO) and people are not allowed to go in or out of the relevant area. According to the Directive No 20, under the heading of 'Management At The Scene of Disaster Based on Zone', the scene of disaster can be divided into Red, Yellow or Green Zone, depending on the level of disaster and the Disaster Operations Commander will control the moving in and out of the authorised persons only in the zone. The role is given to the Royal Malaysian Police to coordinate disaster operations at the scene of disaster, to cordon off the area and control movement therein. The control is necessary for the safety of members of the public. This line of action cannot be found in the NSCA itself but in the directives and policies issued (see s 16 of the NSCA]. It is therefore my view, to understand the provisions of the NSCA and to know the spirit upon its enactment, we must also look at the directives and the policy issued and formulated.

[206] In the circumstances, I hold that the measures adopted in s 22 are justified as it has a rational nexus and is proportionate to the objective to be addressed, namely, national security. It must always be borne in mind that matters of security involve policy consideration which are within the domain of the executive. This has been aptly explained by this court in the case of *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 81, that courts do not possess knowledge of the policy consideration which underlay

administrative decisions; neither can the courts claim it is ever in the position to make such decisions or equipped to do so. Of course we are not reviewing any administrative decision in this special case. However, the NSCA also concerns national security and public order. Hence, regardless how challenge is mounted, where matters of national security and public order are involved, the court should not intervene and should be hesitant in doing so as these are matters especially within the preserve of the Executive, involving as they invariably do, policy considerations and the like.

[207] Based on the reasons given, I am of the considered view that s 22 of the NSCA as well as s 18, do not run afoul of cl (2) of art 9 of the FC. Thus, the NSCA is valid law which does not need to seek refuge in cl (1) of art 149 of the FC, in addition to my earlier conclusion that the NSCA could not, in any event, have been enacted under art 149. Unless and until the condition precedent in Clause 1 of art 149 is present and there is at the same time a clear violation of art 9 and the other provisions mentioned, Parliament cannot resort to art 149 to enact the NSCA. On the contrary, Parliament has quite rightly relied on and utilised its authority and powers under art 74 read with List I of the FC to enact the NSCA. My answer to the third issue is consequently and obviously in the negative. Once again, I must emphasise that there is a serious void of essential facts; that at no time did the appellant allege that his movement had been impeded as a result of any exercise of the powers under ss 18 and 22, in which case, his complaint should be dismissed *in limine*.

CONCLUSION

[208] Lest we forget, cl (1) of art 4 of the FC, inter alia, states that any law which is inconsistent with the FC shall be void only to the extent of the inconsistency. Meaning, even if certain provisions of the NSCA is found to be inconsistent with the FC, which I hold there is none, only that particular provision is to be held void, but not the whole Act. As far as the NSCA is concerned, I shall reiterate, based on the foregoing, my answers to all the three issues are in the negative.

[209] As this is a reference under s 84 of the CJA, sub-s 85(2) of the CJA is relevant. Section 85 says:

> 85(1) Where a special case has been transmitted to the Federal Court under section 84, the Federal Court shall, subject to any rules of court of the Federal Court, deal with the case and hear and determine it in the same way as an appeal to the Federal Court.
>
> (2) When the Federal Court shall have determined any special case under this section *the High Court* in which the proceedings in the course of which the case has been stated are pending *shall continue and dispose of the proceedings in accordance*

with the judgment of the Federal Court and otherwise according to law. (Emphasis added.)

[210] Thus, I order this case be remitted to the High Court for the final disposal of the OS in accordance with this judgment. I further order, pursuant to sub-s 83(2) of the CJA, costs of the proceedings in this court be determined by the High Court.

[211] My learned sisters, Zabariah Mohd Yusof, Hasnah Mohammed Hashim, Mary Lim Thiam Suan and Rhodzariah Bujang, FCJJ have read these grounds of judgment in draft and they concur and agree with the reasons and conclusions reached.

By majority, the amending Acts and the NSCA valid and constitutional.

Reported by Ashok Kumar